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In The

Supreme Court of the United States

October Term, 1997

WAL-MART STORES, INC.

Petitioner,

vs.

CLYDE E. GRIFFITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Under the Americans with Disabilities Act, is an employer entitled to summary judgment when the employee, in sworn statements submitted to obtain disability benefits, has already admitted facts that demonstrate his or her inability to perform essential job functions?

PARTIES TO THE PROCEEDING

Wal-Mart Stores, Inc. is the legal name of the Petitioner. Pursuant to Supreme Court Rule 29.6, Petitioner certifies that it has no parent company. The following are nonwholly owned subsidiaries of Wal-Mart Stores, Inc.: CIFRA S.A. de C.V.; CMA-USA, L.C.; Quality Licensing Corp.; Temple Beverages, Inc.; Wal-Mart Brazil Participacocs, S.A.; Wal-Mart Pharmacy of Michigan, Inc.; Wares Delaware Corporation.

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Wal-Mart Stores, Inc. ("Wal-Mart"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit"), reported at 135 F.3d 376 (6th Cir. 1998), reversed the decision of the United States District Court for the Eastern District of Kentucky, Covington Division ("the District Court"), which granted summary judgment in favor of Petitioner, Wal-Mart. The Sixth Circuit's Opinion is printed here as Appendix A. The District Court's Opinion, reported at 930 F. Supp. 1169 (E.D. Ky. 1996), is printed here as Appendix B. The Order of the Sixth Circuit denying Wal-Mart's Petition for Rehearing, or in the alternative, for Rehearing *en banc*, filed March 11, 1998, is printed here as Appendix C.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgment on January 29, 1998. A timely Petition for Rehearing, or in the alternative, for Rehearing *en banc,* was filed. That Petition was denied on March 11, 1998. This petition for certiorari is filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA"), 29 U.S.C. § 12101 — 29 U.S.C. § 12213, prohibits discrimination in the work place against "a qualified individual with a disability." 29 U.S.C. § 12112(a). A "qualified individual with a disability," is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the

employment position that such individual holds or desires." 29 U.S.C. § 12111(8). The term "essential functions" means the fundamental job duties of the employment position. 29 C.F.R. § 1630.2(n)(1) (1995).

To state a *prima facie* case of discrimination under the ADA, the claimant must show that he is: (1) a disabled person within the meaning of the ADA; (2) "qualified," with or without reasonable accommodation, to perform the essential functions of the job; and (3) was subjected to an adverse employment decision. *Kocsis v. Multi-care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996).

The Social Security Act provides that an individual is "disabled" if:

> His physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience engage in any other kind of substantial gainful work which exists in the immediate area in which he lives, or whether a specific vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A).

STATEMENT OF THE CASE

Petitioner, Wal-Mart, owns and operates stores throughout the United States. In September 1990, Wal-Mart employed Respondent, Clyde Griffith ("Mr. Griffith"), as a sales associate at its store in Florence, Kentucky. Unbeknownst to Wal-Mart, Mr. Griffith had sustained a serious back injury in 1984 that had resulted in the Kentucky Workers' Compensation Board declaring

him 100% occupationally disabled.[1] He received full workers' compensation benefits for that injury. Mr. Griffith also had a history of severe depression beginning in 1988. As a result of these conditions, Mr. Griffith was unemployed from 1984 until 1990. Mr. Griffith did not reveal on his 1990 Wal-Mart job application that he had been adjudicated 100% disabled, nor did he reveal that he had been unemployed for six years due to his disability.

Sales associates at Wal-Mart are expected to respond to customer needs, operate the cash register as needed, respond to price checks and "zone" their departments, which means the employee must insure that merchandise is properly marked, replenish the stock, clean spills, and otherwise responsibly maintain his or her work area. The physical demands of the job require that a sales associate be able to walk, stand, lift and move objects weighing 25 to 50 pounds, bend, twist, squat, be able to grasp firmly, to reach above shoulder level, and to perform repetitive hand actions. When he was hired, Mr. Griffith was advised of these job requirements. Mr. Griffith revealed that he had undergone two back operations and advised that he had restrictions on the amount of weight he could lift. However, Mr. Griffith stated he could perform the job duties and was hired.

At his request, Mr. Griffith was originally assigned as a sales associate in the sporting goods department at Wal-Mart. Mr. Griffith performed only light lifting and carrying within his medical restrictions. In April 1991, Mr. Griffith complained about having to unload a dolly of weights being offered for sale. He brought in a doctor's note limiting him from repetitive bending or lifting.

---

1. Ky. Rev. Stat. Ann. § 342.0011(11)(c) defines "permanent total disability" to mean "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury."

Consequently, Mr. Griffith was reassigned to the hardware department as a sales associate. He was able to perform the essential functions of that job. While working in the hardware department, Mr. Griffith advised Wal-Mart of various additional physical restrictions placed upon him pursuant to doctor's orders, all of which were accommodated by Wal-Mart.

In November 1991, Mr. Griffith reinjured his back while working at Wal-Mart. He was off work until December 21, 1991. Mr. Griffith returned to work for about three months with medical restrictions prohibiting lifting over 15 pounds and long periods of standing. According to Mr. Griffith, Wal-Mart fully accommodated these restrictions. Mr. Griffith was off again for another month in order to have physical therapy on his back. He returned to work on April 20, 1992, with a medical prohibition against heavy or repetitive lifting or carrying and extended periods of standing. Again, upon his return, Wal-Mart accommodated Mr. Griffith's limitations.

In October 1992, Mr. Griffith took a week's vacation; he was scheduled to return to work on October 19, 1992. While on vacation, Mr. Griffith's car broke down. What happened next is in dispute. Wal-Mart contends it granted Mr. Griffith's request for certain additional days off, but that he failed to report to work when scheduled to do so. Mr. Griffith claims he was unaware that he was expected to return to Wal-Mart to work on the day specified. In any event, on October 29, 1992, Mr. Griffith was terminated by the store manager for failing to report to work and lack of dependability.

In May 1993, Mr. Griffith applied for Social Security Disability Insurance Benefits ("SSDI"). In his "Application for Disability Insurance Benefits" Mr. Griffith certified under penalty of perjury:

> I became unable to work because of my disabling condition on October 29, 1992.
>
> I am still disabled.
>
> . . . I agree to notify the Social Security Administration if:
>
> > — my medical condition improves so that I would be able to work, even though I have not yet returned to work.

In further support of his application for benefits, Mr. Griffith stated in his "Disability Report" that his "disabling condition" kept him from working since October 29, 1992. Mr. Griffith further certified that the information he provided was true.

In August 1993, Mr. Griffith reported on the Social Security Administration's ("SSA") "Activities of Daily Living" questionnaire:

> Question: Have you ever done any work outside your home? *If no,* what has kept you from doing the public work? *If yes*, where and when did you last work, for how long, and why did you stop working?
>
> Answer: No! **With my back injury, I can only stand for about 10 minutes at a time.** My back is getting worse.
>
> . . .
>
> Question: If there has been any change from the way these chores were done before your

illness began, describe the change, when the change first happened and the reason for the change.

Answer: I use to do a lot of cooking, some household chores. **Since 1985 to the present I can't stand for a long period of time to do these chores.**

Question: If there have been any changes in how you do "odd jobs" since your illness began, describe what has changed, tell when the change first happened, and explain the reason for the change.

Answer: I use to do all my car repair and cleaning then. **Since 1985 to the present I can't do any odd jobs. My lower back and my depression.**

Question: If how you shop now is different from the way it was before your illness began, describe what has changed, tell when the change first happened, and explain the reason for the change.

Answer: **I use to do some groceries [sic] for myself and go into department [sic], from 1985 to the present I can't do it. Because my lower back and depression.**

(Emphasis supplied.)

On August 9, 1993, Mr. Griffith completed a "Reconsideration Disability Report" and certified that there had been no change in his condition since April 1993:

Question: Has there been any change (for better or worse) in you illness or injury since you filed your claim?

Answer: No.

Question: Describe any physical or mental limitations you have as a result of your condition since you filed your claim.

Answer: **No lifting, standing, walking or sitting for more than 10 [minutes] at a time.**

Question: How does your illness or injury affect your ability to care for your personal needs?

Answer: **There are days I don't get out of bed, or even care for myself. I am very depressed & anxious all of the time.**

Question: What changes have occurred in your daily activities since you filed your claim? (If none, show "none").

Answer: None.

(Emphasis supplied.) Again, Mr. Griffith certified that his statements were true.

In a November 1993 "Statement when Request for Hearing is filed and the Issue is Disability," Mr. Griffith asserted that he was disabled and unable to work. In response to a question about any change in his daily activities, Mr. Griffith responded, **"Yes. My back pain keeps me from doing any activities. It is very hard to take care of myself."** Once again, Mr. Griffith certified that his statements were true.

At the administrative hearing level, at which Mr. Griffith was represented by counsel, the SSA determined that Mr. Griffith was totally occupationally disabled and entitled to full benefits from October 29, 1992, "the date he became disabled." The Decision states:

> The claimant has had a severe back impairment since 1984. He has undergone back surgery in 1985 and 1986, and a neurectomy in 1991. Thereafter, he returned to full-time work as a retail clerk until October 29, 1992. His work ended at that time due to exacerbation of his back pain and depression. . . .
>
> The claimant worked in the past as an auto body repairman, maintenance person, retail sales clerk, and reserve police officer. All of his past relevant jobs required an ability to perform at least light exertion on a sustained basis. **Because of his limitation to significantly less than a full range of sedentary work, he has been unable to engage in past relevant work since October 29, 1992. . . .**
>
> **Essentially, his residual functional capacity precludes all work activity on a full-time basis.** Considering the claimant's age, education, previous work experience, and residual functional capacity, . . . [The SSA regulation] established that the claimant is disabled. . . .

The claimant has been disabled, as defined by the Social Security Act, since October 29, 1992.

(Emphasis supplied.)

Thereafter, in 1994, Mr. Griffith filed a Complaint against Wal-Mart alleging that Wal-Mart had discharged him in violation of the ADA. Wal-Mart filed a Motion for Summary Judgment, arguing that Mr. Griffith's sworn statements made to obtain SSDI benefits precluded him from arguing he was a "qualified individual with a disability" under the ADA. The District Court granted Wal-Mart's Motion for Summary Judgment and concluded that Mr. Griffith had not presented a genuine issue of material fact concerning his ability to perform the essential job functions of a sales associate at Wal-Mart. The District Court found that no reasonable jury could conclude that Mr. Griffith was a "qualified individual with a disability," as defined by the ADA, because of Mr. Griffith's sworn statements to the SSA concerning his physical abilities.

The Sixth Circuit reversed the decision of the District Court, concluding that an employee's representations about his or her ability to work in an application for Social Security benefits is relevant, but not conclusive, evidence of the employee's ability to work with reasonable accommodation for ADA purposes. The Court remanded the case to the District Court for trial on the issue of whether Mr. Griffith was able to perform his essential job functions with accommodation at the time of his termination. A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CLEAR CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ABOUT HOW TO APPLY THE ADA WHEN THE CLAIMANT HAS BEEN AWARDED DISABILITY BENEFITS UNDER THE SOCIAL SECURITY ACT AS WELL AS ADJUDICATED "TOTALLY DISABLED" UNDER A STATE WORKERS COMPENSATION STATUTE.

The Circuit Courts of Appeals are split over how to deal with ADA claimants who have been awarded disability benefits under the SSA, state workers compensation statutes, or by private disability insurance carriers.

In the instant case, Mr. Griffith testified in one proceeding that he was 100% disabled (in order to obtain state workers' compensation benefits) and gave sworn statements in another proceeding that he was completely incapable of working or even taking care of himself (in order to obtain SSDI benefits). Yet in filing his ADA claim, Mr. Griffith asserted he was capable of working and performing his essential job functions at Wal-Mart, *i.e.*, he was a "qualified individual." Under those circumstances, the District Court granted summary judgment to Wal-Mart, in part based on the theory of judicial estoppel.

Judicial estoppel is a common law preclusion doctrine that allows a court to bar a party from asserting a position before it that contradicts a position the party has taken elsewhere. Application of the theory of judicial estoppel protects the integrity of the judicial system by preventing a party from taking inconsistent positions in different forums. In the ADA/SSDI context, courts have applied judicial estoppel to prevent an

individual who has sworn he cannot work in order to obtain SSDI benefits from then suing a potential employer arguing that he can work.

In the instant case, the Sixth Circuit refused to apply the theory of judicial estoppel. The Court concluded that Mr. Griffith should be allowed to have the opportunity to prove that he is able to perform the "essential functions" of the Wal-Mart job, despite his statements to the SSA.

The Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits have refused to apply judicial estoppel when an ADA claimant has certified disability to the SSA. *Johnson v. State of Oregon*, __ F.3d __, 1998 WL 181297, No. 96-36191 (9th Cir. April 20, 1998); *Smith v. Midland Brake, Inc.*, 138 F.3d 1304 (10th Cir. 1998)[2]; *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997); *Weigel v. Target Stores, Inc.*, 122 F.3d 461 (7th Cir. 1997); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582 (D.C. Cir. 1997). These courts take the position that a finding of "disability" by the SSA is not necessarily inconsistent with a finding that the same individual is a "qualified individual with a disability" under the ADA, because the ADA considers the issue of reasonable accommodation when determining "disability" while the Social Security Act does not.

The First, Third, and Fifth Circuit Courts of Appeals have reached the opposite conclusion. These courts hold that judicial estoppel should be applied to preclude a claimant from claiming he was a "qualified individual with a disability" under the ADA where that same individual has sworn to the SSA that he was disabled and unable to work. *Moore v. Payless Shoe Source*, Inc., __ F.3d __, 1998 WL 138851, No. 97-2110 (8th Cir. March

2. The Tenth Circuit has recently stated that it will not apply judicial estoppel in any context. *Rascon v. U.S. West Communications*, __ F.3d __, 1998 WL 223465, No. 98 CJ C.A.R. 2194 (10th Cir. May 6, 1998).

30, 1998); *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 15, 1997) (No. 97-1008); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3rd Cir. 1996), *cert. denied*, __ U.S.__, 1175 S. Ct. 958, 136 L. Ed. 2d 845 (1997); *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992).

In *McNemar,* the claimant, like Mr. Griffith here, sought and obtained SSDI benefits, based on his sworn assertions that he was permanently and totally disabled. The Third Circuit Court of Appeals dismissed his claim under the ADA. The Court noted that the employee had "asserted inconsistent positions regarding his ability to work." *McNemar*, 91 F.3d at 618. Under these circumstances, the Court estopped the claimant from "speaking out of both sides of his mouth with equal vigor and credibility. . ." *Id.*[3]

The Third Circuit's analysis in *McNemar* supports the logical position that it is entirely inconsistent for a Plaintiff to assert total inability to work when seeking disability benefits, whether SSDI, workers' compensation, or other private insurance, while also pursuing an ADA claim asserting ability to perform a job. The difference between how the ADA and the Social Security Act define "disability" is irrelevant in these circumstances. The point is that a claimant should not be able to swear to one set of facts in one proceeding and an entirely different set of facts in another. The integrity of the judicial process is jeopardized when a claimant is permitted to take contrary factual positions in order to achieve advantageous results.[4]

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3. The Third Circuit has acknowledged that *McNemar* is controversial, but has expressly declined to revisit the decision. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 498 (3rd Cir. 1997).

4. A litigant is free to make contradictory or inconsistent legal arguments. Judicial estoppel applies only to prevent a claimant from advancing inconsistent *factual* positions.

The present case illustrates the point well. Mr. Griffith has sworn to facts that establish he is completely unable to work, with or without "accommodation." His filings with the SSA establish that he often cannot even get out of bed and is barely able to take care of himself. He has repeatedly stated he cannot stand for more than 10 minutes. Given those sworn statements, Mr. Griffith should not be allowed to claim that he could have done his job as a sales associate at Wal-Mart if the company had "reasonably accommodated" him.

The Fifth Circuit Court of Appeals has applied similar reasoning. In *Cleveland*, the Court held that application for or receipt of SSDI benefits "creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.' " *Cleveland,* 120 F.3d at 518 (emphasis in original).

The Eighth Circuit Court of Appeals has adopted this view as well. In *Moore*, the Court did not invoke judicial estoppel to bar the Plaintiff's ADA claim, but noted that she must establish by "strong countervailing evidence" that she is qualified to perform the essential functions of the job. *Moore*, 1998 WL at 138854.

The decisions from the First Circuit Court of Appeals are somewhat inconsistent with one another creating an internal conflict within the First Circuit. In *August,* the court applied judicial estoppel, holding that an employee who claimed total disability at the same time he was seeking relief under the Massachusetts disability discrimination statute could not be a "qualified handicapped person" under that state statute. *August*, 981 F.2d at 578. However, in *D'Aprile v. Fleet Servs. Corp.*, 92 F.3d 1 (1st Cir. 1996), the court reversed a lower court decision relying on *August*, based on the particular facts of that case, noting that the employee "never claimed to have been totally disabled at the time she requested an accommodation." *Id.* at 4.

The Second Circuit Court of Appeals is undecided on this issue. The court has expressly adopted the theory of judicial estoppel and applied it in an Age Discrimination in Employment Act case, but has declined to address judicial estoppel in the ADA/SSDI context. *Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2d Cir. 1997). However, the *Simon* Court did affirm, without opinion, a district court decision that applied judicial estoppel against a plaintiff in an ADA case because he had received SSDI benefits. *Violette v. International Business Machs. Corp.*, 962 F. Supp. 446 (Vt. 1996), *aff'd*, 116 F.3d 466 (2d Cir. 1997).

The conflict among the circuits justifies the grant of certiorari to review the judgment below. Virtually all the circuits have ruled on this issue and the result is a confusing patchwork of inconsistent decisions that cannot be reconciled. Employers like Wal-Mart, who operate in all states, are left to guess what law will be applied to the acts of the company. It is critical that important federal statutes such as the ADA and the SSA be interpreted and administered uniformly.

The confusion created by this split among the circuits is not merely theoretical. Many employers are grappling with how to appropriately interpret and apply the ADA. The Equal Employment Opportunity Commission ("EEOC") has filed amicus briefs in many of the cases that discuss this issue, including the present case. The EEOC's presence in these cases is indicative of the importance of this question to employers and employees alike.

There is also a wealth of recent scholarly commentary on this issue. *See, e.g.*, Anne E. Beaumont, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. Rev. 1529 (Dec. 1996); Roxella T. Cavazos and Joseph R. Profaizer, *Recent Developments in Employment Law*, 33 Tort & Ins. L.J. 393 (Winter, 1998); Matthew Diller,

Dissonant Disability Policies: The Tensions Between the Americans With Disability Act and Federal Disability Benefit Programs, 76 Tex. L. Rev. 1003 (April, 1998); Heather Hamilton, *Judicial Estoppel, Social Security Disability Benefits and the ADA: The Circuits Diverge*, 9 DePaul Bus. L.J. 127 (Fall/Winter 1996); Elissa Kirby, *Civil Procedure — A Conflict of Interests: Frustrating the Goals of Anti-discrimination Legislation with the Third Circuit's Latest Judicial Estoppel Analysis — McNemar v. Disney Store, Inc.*, 70 Temp. L. Rev. 349 (Spring 1997); Jorge M. Leon, *Two Hats, One Head: Reconciling Disability Benefits and the Americans with Disability Act of 1990*, 1997 U. Ill. L. Rev. 1139 (1997); Andrea Christensen Luby, *Note: Estopping Enforcement of the Americans With Disability Act*, 13 J.L. & Pol. 415 (Spring 1997); Robert E. Rains, *The Americans with Disabilities Act & The Social Security Act: Complementary Remedies or Catch 22?*, 43-DEC Fed. Law. 22 (November/ December, 1996); Marney Collins Sims, *Estop It! Judicial Estoppel and its Use in Americans with Disabilities Act Litigation*, 34 Hous. L. Rev. 843 (Fall 1997); Maureen C. Weston, *The Road Best Traveled: Removing Judicial Roadblocks that Prevent Workers From Obtaining Both Disability Benefits and ADA Civil Rights Protection*, 26 Hofstra L. Rev. 377 (Winter 1997); and Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans With Disabilities Act*, 38 S. Tex. L. Rev. 907 (July, 1997). These articles discuss the split among the circuits and each advocates a different approach to reconcile and implement the goals of the ADA and SSA.

Many employees are likewise unclear about their rights and obligations under these federal statutes, particularly given the conflicting interpretations adopted by the various courts. A worker who has an alleged claim against an employer for violation of the ADA needs to know if he will forfeit that claim by filing an application for SSDI benefits. If the theory of judicial estoppel is adopted to bar inconsistent factual statements, then workers need

to be told that what they say on an application for SSDI benefits is binding and will be used against them.

II.

HOW TO CORRECTLY INTERPRET AND APPLY THE ADA WHEN A DISABLED CLAIMANT IS ALSO RECEIVING DISABILITY BENEFITS IS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

There are widely divergent interpretations of how to apply the provisions of the ADA when the claimant has applied for or received disability benefits of various kinds. The Circuit Court decisions discussed above point out the significant and recurring problems concerning efforts to apply the provisions of the ADA to individuals who have applied for or been deemed entitled to disability benefits. Mr. Griffith's case presents not only the issue of his application for and receipt of SSDI benefits, but also the effect of his receipt of total disability benefits under Kentucky's workers' compensation statute.

Mr. Griffith certified to the SSA that he was disabled. He was also adjudicated totally disabled under Kentucky law. The relevant statute is Ky. Rev. Stat. Ann. § 342.0011(11)(c). Under that statute, a worker who has been found to have a "permanent total disability" is defined as one who "has a complete and permanent inability to perform any type of work as a result of an injury." While a litigant should be free to make contradictory or inconsistent legal arguments, a party should not be allowed to advance inconsistent versions of the facts. Mr. Griffith simply cannot have it both ways. If he is completely unable to perform any type of work, as Kentucky has found, and is unable to stand or sit for more than ten minutes, as he has admitted, he should be

precluded from arguing that he is capable of working at Wal-Mart.

This Sixth Circuit's analysis of Mr. Griffith's claim is flatly wrong. The *Griffith* Court's opinion notes, for example, that the statements made on the SSA application and forms often are merely check off boxes, and thus the claimant may not be able to adequately explain his medical condition. *Griffith,* 135 F.3d at 382. The *Griffith* Court simply ignored the fact that Mr. Griffith provided at different times several detailed explanations of his condition to the SSA. Contrary to the Sixth Circuit's view, Mr. Griffith did indeed answer the "precise question of whether the applicant could have worked with a reasonable accommodation during the relevant period." *Id.* Unfortunately for Mr. Griffith's ADA claim, his answer was no.

Courts that have allowed ADA claims by individuals who are also receiving SSDI benefits have mistakenly interpreted and applied those statutes and distorted congressional intent. Both statutory schemes are designed to assist disabled individuals, but they were not intended to allow a claimant to obtain duplicate benefits. The tortured reasoning applied by some of the Circuit Courts of Appeals allows the same individual to collect monetary benefits based on representations that he is totally disabled and unable to work, yet at the same time sue an employer who declines to hire him. The ADA was not intended to allow individuals who are not capable of working to sue employers.

These courts err in not reading the two statutes together and harmonizing them where appropriate. The Social Security statutes can and should be construed in light of the adoption of the ADA. That is, in order to recover SSDI benefits, a claimant should be required to prove that he or she cannot work even with the ADA in place. Applying the law in this fashion results in SSDI benefits

being reserved for those who are truly unable to work,[5] while preserving the rights of disabled individuals who are capable of working to sue employers who refuse to accommodate their disabilities under the ADA.

These are important and recurring issues that are pending in a substantial number of cases. Because the Circuit Courts of Appeals have resolved these questions in many different ways, and in some cases, in a way clearly not intended by Congress, this Court should take the opportunity to settle the important question of interpretation of the ADA in concert with the SSA, both significant federal statutes.

III.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT CONCERNING THE PROPER STANDARDS FOR THE GRANT OF SUMMARY JUDGMENT AND DEMONSTRATES CONTINUING CONFUSION AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF THIS COURT'S SUMMARY JUDGMENT STANDARDS.

A review of the decisions cited above demonstrates that not only do the Circuit Courts of Appeals disagree about how or whether to apply the doctrine of judicial estoppel, but that many of the Circuits, including the Sixth Circuit in the case at bar, have misinterpreted and misapplied this Court's directives regarding summary judgment. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court held that summary judgment **must** be granted

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5. The total cost of SSDI benefits is staggering and has been growing. In 1991 those costs were $28.5 billion and they were expected to grow to over $38 billion by 1997. Jerry L. Mashaw, *Against First Principles*, 31 San Diego L. Rev. 211, 226 (Winter 1994).

> against a party who fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322.

In order to prevail on a claim under the ADA, the claimant bears the burden to prove at trial that he or she is a "qualified individual with a disability." This is defined by the ADA as

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

29 U.S.C. § 12111(8). Accordingly, in the present controversy, it is Mr. Griffith's burden to establish that he can perform the "essential functions" of the job at Wal-Mart.

The Sixth Circuit concluded that Mr. Griffith's representations to the SSA about his ability to work were relevant, but not conclusive, evidence concerning his ability to work with reasonable accommodation. Thus, the Court held, there were questions of "material fact" that precluded the entry of summary judgment. The case was remanded to allow Mr. Griffith to develop evidence contradicting his prior sworn statements that unequivocally establish his complete inability to perform the Wal-Mart job. This conclusion is wrong and at odds with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) which requires that a party present more than a mere "scintilla of evidence" to defeat a properly supported motion for summary judgment.[6]

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6. The decision under review is also completely inconsistent with a decision by another panel of the Sixth Circuit. *See Blanton v. Inco Alloys Inter., Inc.*, 108 F.3d 104, 108-109 (6th Cir. 1997) and the supplemental opinion found at 123 F.3d 916, 917 (6th Cir. 1997). Therefore, the Sixth Circuit, like the Third Circuit, has an internal conflict as to the correct resolution of this issue.

This Court has made clear that summary judgment should be granted unless there is a "genuine" issue of material fact. "Some metaphysical doubt as to the material facts" is insufficient. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). When a claimant has committed to a set of facts in sworn statements and the only way for the claimant to overcome summary judgment is to contradict those prior statements there is no genuine issue for trial.

Here, the Sixth Circuit erred. The Court should have held, *as a matter of law*, that no reasonable jury could find Mr. Griffith capable of performing the essential functions of the Wal-Mart job. As the District Court concluded:

> The inconsistencies between these job requirements and Griffith's representations about his disability preclude Griffith from raising an issue of fact as to whether, on the date he was terminated by Wal-Mart, he was a qualified individual under the ADA . . .
>
> . . . . .
>
> Because he is precluded from proving that he was 'otherwise qualified' to perform the essential functions of his position at Wal-Mart, Griffith cannot make out a prima facie case under the ADA. Wal-Mart is thus entitled to summary judgment on this claim.

Griffith, 930 F. Supp. at 1173-74.

Unlike the Sixth Circuit in the instant case, the Ninth Circuit Court of Appeals has correctly applied this Court's summary judgment standards in a similar case. In *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996), an employee asserted in applying for SSDI benefits and state disability benefits that she was "totally disabled." Weighing that assertion against the

Plaintiff's "uncorroborated and self-serving" deposition testimony in the ADA case that she was not totally disabled, left "no genuine issue that she could have performed her job with the proposed, or any other, accommodation." *Id.* at 1481-82. Thus, summary judgment for the employer was required.

Likewise, the Fifth Circuit Court of Appeals has concluded that an employee whose claims of total disability were "unambiguous and previously uncontroverted . . . cannot now be heard to complain that she could perform the essential functions of her job." *Cleveland*, 120 F.3d at 518 (summary judgment for employer). *See also, McConathy v. Dr. Pepper/ Seven Up Corp.*, 131 F.3d 558, 562 (5th Cir. 1998) (summary judgment for employer affirmed when ADA claimant stated in application for SSDI benefits stated that she couldn't "hold a management position or any position even on a part-time basis") and *Moore*, __ F.3d __, 1998 WL 138851 at 138853 (affirming summary judgment for employer when employee's only evidence to contradict her sworn statements to the SSA that she was unable to work was a self-serving affidavit saying she could perform essential job functions).

Regardless of the theory of judicial estoppel, the Sixth Circuit's decision to reverse the summary judgment granted to Wal-Mart by the District Court was erroneous. Summary judgment should have been entered for Wal-Mart, where the only way Mr. Griffith could overcome Wal-Mart's proof on this issue was to flatly contradict previous sworn statements. Under controlling Supreme Court precedent, such self-serving evidence is not sufficient to create a "genuine issue of material fact." Many of the other circuits that have considered this issue have likewise applied the wrong summary judgment analysis. These decisions reflect that the circuit courts are simply ignoring this Court's directive to enforce the summary judgment rule as written and are creating jury issues when there are no legitimate issues of genuine fact.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 29, 1998

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CLYDE N. GRIFFITH,
Plaintiff-Appellant,

v.

WAL-MART STORES, INC.,
Defendant-Appellee.

No. 96-6361

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 94-00117--William O. Bertelsman, District Judge.

Argued: October 30, 1997

Decided and Filed: January 29, 1998

Before: RYAN and BATCHELDER, Circuit Judges;
CAMPBELL, District Judge*

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*The Honorable Todd J. Campbell, United States District Judge for the Middle District of Tennessee, sitting by designation.

Appendix A

COUNSEL

ARGUED: Lee Hornberger, Cincinnati, Ohio, for Appellant. Michael A. Luvisi, WOODWARD, HOBSON & FULTON, Louisville, Kentucky, for Appellee. **ON BRIEF:** Lee Hornberger, Cincinnati, Ohio, for Appellant. Elizabeth U. Mendel, Kathryn A. Quesenberry, WOODWARD, HOBSON & FULTON, Louisville, Kentucky, for Appellee. Paul Bogas, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF GENERAL COUNSEL, Washington, D.C., for Amicus Curiae.

OPINION

CAMPBELL, District Judge. Plaintiff appeals the district court's grant of summary judgment in favor of Defendant on Plaintiff's claim that Defendant violated the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* ("ADA"). Specifically, the district court held that Plaintiff was precluded from showing he was a "qualified individual with a disability" under the ADA because Plaintiff previously made certain representations regarding his disability in an application for Social Security disability benefits. For the reasons discussed below, we REVERSE the judgment of the district court.

I.

Plaintiff Clyde Griffith, a former employee of Defendant Wal-Mart Stores, Inc., brought this action alleging that Wal-Mart discriminated against him by discharging him because of his disability, in violation of the ADA and the Kentucky Equal Opportunities Act, Ky. Rev. Stat. Ann. §§ 207.130, *et seq.* Plaintiff also brought state law claims of promissory estoppel, and fraud and deceit.

Appendix A

Plaintiff began working in a Wal-Mart store in Florence, Kentucky on October 3, 1990. In his Wal-Mart employment application, Plaintiff revealed that he had injured his back in 1984 and had undergone back surgery in 1985 and 1986. As a result of the 1984 injury, Plaintiff resigned from the City of Covington Police Department, and was awarded workers' compensation benefits. Plaintiff applied to work at Wal-Mart six years later when his doctor lifted his "no work" restriction.

Plaintiff's first assignment at Wal-Mart was a sales associate position in the Sporting Goods Department. Three to four months later, after Plaintiff complained to management that the heavy lifting in the Sporting Goods Department caused him back pain, Wal-Mart transferred Plaintiff to the Hardware Department. While in the Hardware Department, Wal-Mart accommodated the various physical restrictions placed on the Plaintiff by his doctor. According to Wal-Mart, Plaintiff was able to perform the essential functions of his job in the Hardware Department.

During November, 1991, the store manager ordered Plaintiff to move certain heavy items, and Plaintiff reinjured his back.[1] Pursuant to the orders of his doctor, Plaintiff missed a couple months of work over the next six months. Upon his return to work, Plaintiff was subject to restrictions on heavy lifting and long periods of standing. Wal-Mart accommodated those restrictions in the Hardware Department.

In September, 1992, Wal-Mart transferred Plaintiff back to the Sporting Goods Department. On October 26, 1992, Wal-Mart discharged Plaintiff for failing to report to work and lack of dependability. Plaintiff contends he was given permission to be absent from work during this time to take care of car trouble.

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[1] Plaintiff filed a workers' compensation claim as a result of this injury, which the parties subsequently settled.

Plaintiff subsequently filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that Wal-Mart discriminated against him because of his disability by firing him due to his back problems. The EEOC issued a "right to sue" letter in April, 1993.

During the next four months, Plaintiff received unemployment benefits while unsuccessfully seeking various jobs. In April, 1993, Plaintiff applied for disability insurance benefits from the Social Security Administration ("SSA") based on his back ailment. It is the statements made by the Plaintiff in the SSA application forms that led the district court to reject Plaintiff's ADA claim.

The district court noted the following statements made by the Plaintiff in his application for benefits:

> ... I became unable to work because of my disabling condition on October 29, 1992. I am still disabled.
>
> ... I have not been able to work since I was let go by Wal-Mart in [sic] October 29, 1992.[2]
>
> * * *
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true.

Griffith v. Wal-Mart Stores, Inc., 930 F.Supp. 1167, 1168-69 (E.D.Ky. 1996). These typewritten statements, along with several others, are included in a form generated by the SSA, which is signed by Plaintiff.

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[2]Wal-Mart terminated Plaintiff on October 26, 1992. The district court assumed that Plaintiff used this later date in his application by mistake.

Appendix A

The district court also noted that in the accompanying Disability Report, the Plaintiff was asked when his disabling condition first bothered him, and Plaintiff answered: "November 21, 1991," and explained that he reinjured his back on that day while working at Wal-Mart. Plaintiff was also asked when his condition finally made him stop working, and he answered: "October 29, 1992." 930 F.Supp. at 1169.

The district court also noted that in the "Activities Of Daily Living" questionnaire, completed by the Plaintiff four months later, on August 26, 1993, in answer to various questions, Plaintiff described the limitations caused by his back problem, as follows:

> I can only stand for about ten minutes at a time. My back is getting worst [sic].
>
> * * *
>
> From 1985 to the present I need help to get out of the [bath] tub and sometime to get help to get off the couch.
>
> * * *
>
> Since 1985 to the present, I can't do any odd jobs.
>
> * * *
>
> [F]rom 1985 to the present I can't [do grocery shopping].

Id. Plaintiff also stated that the only household chore he could perform was folding clothes. *Id.*

In a subsequent statement filed with the SSA on November 5, 1993, Plaintiff stated: "My back pain keeps from doing any activities. It is very hard to take care of myself." *Id.*

Although the Plaintiff was initially denied SSA benefits, an Administrative Law Judge issued a decision on July 22, 1994,

without holding a hearing, that Plaintiff was entitled to disability benefits retroactive to October 29, 1992. In reaching his decision, the ALJ stated:

> The claimant worked in the past as an autobody repairman, maintenance person, retail sales clerk, and reserve police officer. All of his past relevant jobs required an ability to perform at least light exertion on a sustained basis. Because of his limitation to significantly less than a full range of sedentary work, he has been unable to engage in past relevant work since October 29, 1992.
>
> * * *
>
> Essentially his residual functional capacity precludes all work activity on a full-time basis. Considering the claimant's age, education, previous work experience, and residual functional capacity, [the SSA regulation] establishes that the claimant is disabled.
>
> * * *
>
> The claimant has been disabled, as defined in the Social Security Act, since October 29, 1992.

Id.

Following what it considered to be the majority view, the district court held that an individual is precluded from showing that he is capable of performing the essential functions of his job for purposes of an ADA claim, if that person has represented that he is disabled in order to obtain long term disability benefits.[3] 930 F.Supp. at 1170-71.

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[3] Among the cases cited by the district court are *Reigel v. Kaiser Foundation Health Plan N.C.*, 859 F. Supp. 963 (E.D.N.C. 1994); *Simo v. Home Health and Hospice Care*, 906 F. Supp. 714 (D.N.H. 1995). *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555 n.4 (D. Kan. 1995).

Applying that view in this case, the district court held "the inconsistencies between [Wal-Mart's Sales Associate] job requirements and Plaintiff's representations about his disability preclude Plaintiff from raising an issue of fact as to whether, on the date he was terminated by Wal-Mart, he was a qualified individual under the ADA." 930 F.Supp. at 1173.

II.

We review the district court's grant of summary judgment de novo. *Birgel v. Board of Comm'rs of Butler Co., Ohio*, 125 F.3d 948, 950 (6th Cir. 1997). Accordingly, we view the evidence and the record in the light most favorable to the Plaintiff to determine whether a genuine issue of material fact exists. *Id.*; Fed. R. Civ. P. 56(c). Summary judgment was appropriately granted to the Defendant if the evidence shows there is no genuine issue of material fact and that the Defendant is entitled to judgment as a matter of law. *Id.*

The ADA prohibits discrimination against "a qualified individual with a disability because of the disability of such individual" with regard to hiring, compensation, discharge, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Reasonable accommodation may include job restructuring, part-time or modified work schedules and reassignment to vacant positions. 42 U.S.C. § 12111(9). The relevant time for determining whether the plaintiff is a "qualified individual with a disability" is at the time of discharge. *Kocsis v. Multi-Care Mgr., Inc.*, 97 F.3d 876, 884 (6th Cir. 1996).

By contrast, the Social Security Administration does not consider whether an individual is able to work with reasonable accommodation in determining entitlement to disability benefits. A person is disabled under the Social Security Act:

> . . . if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d)(2)(A).

III.

Although the district court ruled that Plaintiff's ADA claim was "precluded" by virtue of the statements Plaintiff made in his SSA application, it did not specify the theory by which it reached this conclusion. As the district court noted, some courts have reached this conclusion based on the doctrine of judicial estoppel. The doctrine of judicial estoppel "forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'" *Teledyne Indus., Inc. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1217 (6th Cir. 1990). Courts apply judicial estoppel in order to "preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Teledyne*, 911 F.2d at 1218. The doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court. *Id.*

Appendix A

Although the federal courts have divergent opinions on the issue[4], the most recent decision of this court on the issue holds that the doctrine of judicial estoppel does not operate to

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[4]In a 1996 decision, the Third Circuit held that a plaintiff who made representations of disability in a disability benefit application was judicially estopped from recovering on an ADA claim. *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3rd Cir. 1996). In a more recent decision, however, the court suggested that *McNemar* should not be applied as a per se rule: "Courts should not assume that McNemar always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record." *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n.5 (3rd Cir. 1997).

The Second Circuit has held that an employee's statements to the Social Security Administration that he was "unable to work" judicially estopped him from claiming he was qualified under the ADA. *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2d Cir. 1997).

The Fifth Circuit has held that an application for or receipt of social security disability benefits "creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'" *Cleveland v. Policy Mgt. Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997).

The Eleventh Circuit does not apply a per se rule of judicial estoppel, but does hold that a plaintiff:

> . . . is estopped from denying the truth of any statements made in her disability application. Our basis for this holding is that an ADA plaintiff should not be permitted to disavow any statements she made in order to obtain SSD benefits.

Talavera v. School Bd. of Palm Beach Co., 129 F.3d 1214, 1220 (11th Cir. 1997).

The issue remains open in the Eighth Circuit. *See Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 502 n. 2 (8th Cir. 1996)("Social Security determinations, however, are not synonymous with a determination of whether a plaintiff is a 'qualified person' for purposes of the ADA."); *Budd v. ADT Sec. Sys.*, 103 F.3d 699, 700 (8th Cir. 1996)(per curiam)(court affirmed district court's opinion based on estoppel theory, and alternatively, determined plaintiff's evidence was insufficient to withstand summary judgment); *Dush v. Appleton Electric Co.*, 124 F.3d 957, 962 n.8 (8th Cir.1997)(estoppel issue "remains open in our Circuit.")

preclude ADA relief to an individual based on that individual's application for and/or receipt of social security disability benefits. In *Blanton v. Inco Alloys Inter., Inc.*, 108 F.3d 104, 108-09 (6th Cir. 1997), a panel of this court, like the district court in this case, held that plaintiff's admission in his application for Social Security disability benefits that he was unable to perform his job prevented him from claiming in his subsequent state law disability discrimination suit that he was able to perform the essential functions of his job.

After the *Blanton* opinion was issued, the District of Columbia Circuit issued an opinion rejecting the judicial estoppel theory. In *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582 (D.C. Cir. 1997), the court reversed the district court's grant of summary judgment for the employer holding that plaintiff's application for and receipt of Social Security disability benefits barred ADA relief. In reaching its decision, the court pointed out that a finding of disability under the Social Security Act gives no consideration to a claimant's ability to work with reasonable accommodation, which is required to be considered under the ADA:

> The contrary view -- that Social Security disability benefits preclude ADA relief -- would force disabled individuals into an 'untenable' choice between receiving immediate subsistence benefits under the Social Security Act or pursuing discrimination remedies. . . . Forcing such a choice would undermine the pro-employment and anti-discrimination purposes of the two statutes. . . . Nothing in either statute requires disabled individuals to make this choice.

Swanks, 116 F.3d at 586.

The *Swanks* Court noted that individual statements in an application for disability benefits could well be relevant in an ADA lawsuit, but explained that the record in that case contained no evidence of Swanks' statements to the Social Security Administration. 116 F.3d at 587.

Appendix A

After the *Swanks* opinion was issued, the parties in *Blanton* sought a rehearing. As a result, the panel issued a supplemental opinion which stated:

> The panel's opinion should not be read to endorse judicial estoppel in this context. We simply held that '[i]n light of the overwhelming weight of the medical evidence, as well as Blanton's own admissions, we find that Blanton was unable to perform his former position of extrusion press crew leader as a matter of law.' We agree with the D.C. Circuit's opinion in *Swanks v. Washington Metro. Area Trans. Auth.*, ____ F.3d _____, 1997 WL 335143 (D.C. Cir. June 20, 1997), that holds that the receipt of disability benefits does not preclude subsequent ADA relief and rejects the doctrine of judicial estoppel, but does allow the consideration of prior sworn statements by the parties as a material factor.

Blanton v. Inco Alloys Inter. Inc., 123 F.3d 916, 917 (6th Cir. 1997)("*Blanton II*").

An individual's application for and receipt of Social Security disability benefits, as the *Swanks* Court points out, gives no consideration to that person's ability to work with reasonable accommodation, which is required to be considered under the ADA. Furthermore, we note that the Social Security Act and implementing regulations establish certain work incentive programs for individuals receiving disability benefits. For example, beneficiaries may engage in a trial work period that allows them to work for nine months while their benefit levels remain unchanged. 42 U.S.C. § 422(c); 20 C.F.R. § 1592(a). Obviously, the definition of "disability" under the Social Security Act does not require a finding that the individual cannot perform any job under any circumstances.

Under *Blanton II*, statements made in an application for Social Security disability benefits, while relevant, do not result in judicial estoppel.

First, judicial estoppel does not apply because the answers given in a Social Security disability benefit application are not necessarily inconsistent with a plaintiff's claim that he could have worked at his job, during the relevant period, with a reasonable accommodation. The precise question of whether the applicant could have worked with a reasonable accommodation during the relevant period is not asked in a Social Security context because, as discussed above, it would not necessarily bar receipt of those benefits.

Furthermore, the statements made in the SSA application and forms are open to interpretation. In determining precisely what the plaintiff "admitted" in the application, one must consider the context in which the statements were made. Portions of the SSA application and other forms require the applicant merely to check off boxes without comment, or require the applicant to fill in blanks with little room given for elaboration. In short, the employee may not have a fair opportunity to accurately explain the details of the employee's medical condition and his ability or inability to work for purposes of the ADA.

Moreover, judicial estoppel is an equitable doctrine, and "is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." *Teledyne*, 911 F.2d at 1218 (footnote omitted). Applying judicial estoppel under the circumstances presented here would be inappropriate given that the truth-seeking function of the court would be supplanted by an agency administrative decision rendered without an evidentiary hearing. For these reasons, the district court's decision cannot be sustained based on the doctrine of judicial estoppel.

Nor can the district court's decision be supported by a theory of "binding admissions." In reaching its decision, the district court cited the First Circuit's decision in *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 580-84 (1st Cir.1992), and indicated that the court precluded ADA relief in similar circumstances by treating the plaintiff's prior representations as "binding admissions." In *August*, the plaintiff had made

representations in applying for his employer's disability benefits that he was totally disabled and did not know when he could return to work. 981 F.2d at 579. The employer later discharged the plaintiff because he would not specify when he would be able to return to work. *Id.* In granting summary judgment to the defendant on plaintiff's state law disability discrimination claim, the First Circuit held that plaintiff had presented no evidence indicating that he was able to perform his job with reasonable accommodation at the time in question. 981 F.2d at 580-83.

In reaching its decision, the *August* Court did not create a new theory of "super admissions" whereby prior representations in disability benefit applications are considered to outweigh all other contrary evidence in the record. Instead, the court held that there was no other evidence in the record to the contrary. Thus, the court simply applied well-established principles of summary judgment in rejecting plaintiff's claim. *See D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996)(distinguishes prior decision in *August*, and holds that genuine fact issue exists as to disability discrimination claim despite plaintiff's prior application for disability insurance benefits; and states that *August* "simply stands for the proposition that the plaintiff's ability to work with reasonable accommodation is an element of a handicap employment discrimination case under Massachusetts law.")[5]

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[5]The district court's decision also cannot be supported through application of issue preclusion or equitable estoppel. Issue preclusion precludes relitigation of the same issue that was raised and actually litigated in a prior suit. *Aircraft Braking Systems Corp. v. Local 856, Inter. Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW*, 97 F.3d 155, 161 (6th Cir. 1996). As discussed above, the issue of whether Plaintiff could have worked with a reasonable accommodation at the time in question was not decided by the ALJ in the Social Security proceeding.

Equitable estoppel requires that the party claiming estoppel show he relied to his detriment on the opposing party's position in a prior proceeding. *Teledyne*, 911 F.2d at 1220. Defendant has not made this

We believe these prior statements should not be the subject of judicial estoppel or a theory of "super admissions," but rather should be analyzed under traditional summary judgment principles. Straightforward summary judgment analysis, rather than theories of estoppel or "super admissions," has also been applied to similar fact situations by other circuits. *Dush v. Appleton Electric Co.*, 124 F.3d at 963-65 (court decides case on summary judgment grounds, leaving open the question of whether judicial estoppel should be applied in this context); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1480-81 n. 3 (9th Cir. 1996) (court found application of judicial estoppel unnecessary because plaintiff did not produce sufficient evidence to withstand summary judgment). *But see Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 605-06 (9th Cir. 1996) (plaintiff in age discrimination action estopped from claiming she was performing her job well when she had previously obtained a favorable workers' compensation settlement).

The Seventh Circuit has outlined this approach as follows:

> The point here is a simple one: When employees (and/or their physicians) represent that they are 'totally disabled,' 'wholly unable to work,' or some other variant to the same effect, employers and factfinders are entitled to take them at their word; and, such representations are relevant evidence of the extent of a plaintiff's disability, upon which an employer may rely in attempting to establish that an ADA plaintiff is not a 'qualified individual with a disability.' At the same time, because the SSA's definition of disability -- as well as those of most disability insurance plans -- differs materially from the ADA's definition of a 'qualified individual with a disability,' these representations are not conclusive as to the ADA issue. When a defendant in an ADA action relies on such representations as the basis for

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showing.

> contending that a plaintiff is not a 'qualified individual,' the plaintiff is free to come forward with additional evidence that shows she could perform the essential duties of a desired position with or without reasonable accommodation notwithstanding the fact that she might have been deemed disabled under some other statutory or contractual framework. . . . As a general matter . . . . absent some such affirmative showing . . . the employer will be entitled to judgment as a matter of law.

Weigel v. Target Stores, 122 F.3d 461, 467-68 (7th Cir. 1997)(footnote omitted).

IV.

Applying this approach to the facts presented here, the court finds that summary judgment was improperly granted to Defendant because there are genuine issues of material facts on the issue of whether Plaintiff was capable of performing the essential functions of his job at Wal-Mart with a reasonable accommodation at the time in question. Plaintiff offered proof that he had performed the sales associate job for approximately two years and had received favorable evaluations. In addition, Defendant admits that Plaintiff was able to perform the sales associate function in the Hardware Department, and that it was able to accommodate Plaintiff's physical restrictions.[6] Indeed, Defendant's store manager testified that Plaintiff had no job performance problems while in the Hardware Department.

Plaintiff contends that his prior statements in his application for disability benefits do not contradict this proof. In the application, Plaintiff stated he was unable to work

---

[6]This evidence conflicts with Defendant's contention that the essential functions of the sales associate position should be determined by the job description in the employee handbook, which states that the tasks a sales associate must perform include: frequently lifting objects weighing at least 25 lbs. and regularly walking or standing.

because "no employer will hire me because of my condition and restrictions." Plaintiff argues that this statement is not inconsistent with his position that he could have, and actually had, worked at his former job with reasonable accommodation. In addition, Plaintiff contends that the statements in "Daily Living Report" are not inconsistent with his position because they relate to Plaintiff's non-work activities and were made some ten months after Plaintiff was discharged, a time when Plaintiff contends his condition had worsened. Similarly, Plaintiff argues that his statement in his request for hearing that his back pain kept him from engaging in any activities was made over a year after he was terminated, at a time when his condition had worsened and he was severely depressed.

Although a jury may ultimately decide that the Plaintiff's explanation of his prior statements is not credible, Plaintiff has presented sufficient proof to establish a genuine issue of material fact as to whether he was a "qualified individual with a disability." Accordingly, the district court erred in granting summary judgment to the Defendant.

V.

Plaintiff also appeals the district court's dismissal of his state law claims. After granting summary judgment to the Defendant on the ADA claim, the district court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff's state law claims. In ruling on the parties' motions to reconsider its judgment, the district court concluded that Plaintiff had not sufficiently alleged the existence of diversity jurisdiction.

We find it unnecessary to reach this issue given the reinstatement of Plaintiff's ADA claim. The ADA claim, of course, confers federal question jurisdiction on the district court. 28 U.S.C. § 1331. Under these circumstances, Plaintiff's state law claims are remanded to the district court to determine whether the district court should exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

Appendix A

VI.

The court concludes that the district court erred in awarding summary judgment to Defendant on Plaintiff's ADA claim, and REVERSES that judgment. The court REMANDS the Plaintiff's state law claims to the district court to determine whether the district court should exercise supplemental jurisdiction over the state law claims.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY AT COVINGTON FILED JUNE 10, 1996

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY AT COVINGTON

CIVIL ACTION NO. 94-117

CLYDE N. GRIFFITH,

PLAINTIFF

VS .

WAL-MART STORES, INC.,

DEFENDANT

OPINION AND ORDER

This is an employment discrimination action alleging violations of the Americans with Disabilities Act ("the ADA"), 42 U.S.C. § 12102 *et seq.*, the Kentucky Equal Opportunities Act ("KEOA"), KRS 207.130 *et seq.*, and the common law of Kentucky. For the reasons set forth below, Wal-Mart's motion for summary judgment is granted on Griffith's ADA claim.

FACTUAL BACKGROUND

Clyde N. Griffith ("Griffith") worked for Wal-Mart Stores, Inc. ("Wal-Mart") at its Florence, Kentucky location from October 3, 1990 until October 26, 1992. On his Wal-Mart employment application, Griffith indicated that he injured his back in 1984 and underwent surgery for the resulting problems

in 1985 and 1986. Griffith was initially assigned to the sporting goods department at Wal-Mart, where he worked for three to four months. He was subsequently transferred to the store's hardware department, where he worked for over a year and a half. At the time of his dismissal, Griffith had been transferred back to sporting goods.

Griffith's termination arose out of a series of events following a vacation in October 1992, during which he experienced automobile problems. Griffith was scheduled to return to work on Monday, October 19, 1992, but he telephoned the store that day to tell them of his car trouble. Griffith's Assistant Manager, Richard Ostendorf ("Ostendorf") was off that day, so Griffith spoke with another Assistant Manager, Steve Kissabeth ("Kissabeth"). Griffith was absent from work over the next several days, during which time he continued to speak with Ostendorf and Kissabeth about his transportation problems. The parties disagree as to whether Ostendorf or Kissabeth excused Griffith from work during this week and, if so, for which days.

Griffith returned to the store on Saturday, October 24, 1992 to pick up his pay check and speak with Ostendorf. Again, the parties disagree as to what was discussed at that time and whether Griffith was supposed to work that day. Griffith worked briefly on Sunday, but was told to leave and return the following day to speak with Store Manager, Larry Greer ("Greer"). On Monday, October 26, 1995, Greer terminated Griffith.

In November 1992, Griffith filed a disability discrimination charge with the Equal Employment Opportunity Commission ("EEOC") in which he alleged that Wal-Mart fired him because of his back problems, and the EEOC ultimately issued a Notice of Right to Sue.

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In April 1993, Griffith applied for Disability Insurance Benefits from the Social Security Administration ("SSA"). In his application, Griffith stated:

- I became unable to work because of my disabling condition on October 29, 1992. I am still disabled.

- I have not been able to work since I was let go by Wal Mart in [sic] October 29, 1992.[1]

- I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the social security act commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true.

Id.

In an accompanying Disability Report, Griffith indicated that his disabling condition first bothered him on November 21, 1991, when he reinjured his back while working at Wal-Mart, and that the condition finally made him stop working as of October 29, 1992. In the "Activities of Daily Living" questionnaire completed by Griffith on August 26, 1993, Griffith described the limitations caused by his back problem, including that:

- he could only stand for about 10 minutes at a time;

1. Wal-Mart actually terminated Griffith on October 26, 1992. The difference in dates appears to be an error on Griffith's part and, as noted *infra*, does not affect the outcome of the pending motion.

Appendix B

- he has needed help getting out of the bath and off the couch since 1985;

- he has been unable to do any odd jobs around the house since 1985;

- he could not do any household chores except folding clothes;

- he has been unable to do the grocery shopping since 1985.

In a further statement to the SSA on November 5, 1993, Griffith stated: "My back pain keeps me from doing any activities. It is very hard to take care of myself."

Griffith was initially denied SSA benefits, but after he pursued his claim and filed a request for a hearing, an ALJ determined on July 22, 1994 that Griffith met the SSA's definition of a disabled individual and qualified for benefits retroactive to October 29, 1992. The ALJ's decision includes the following discussion:

> The claimant has had a severe back impairment since 1984. He has undergone back surgery in 1985 and 1986, and a neurectomy in 1991. Thereafter, he returned to full-time work as a retail clerk until October 29, 1992. His work ended at that time due to exacerbation of his back pain and depression.[2] . . .

---

2. Apparently, the ALJ was not aware that Griffith had actually been terminated by Wal-Mart.

The depression to which the ALJ refers began in September 1988 when Griffith's mother died.

Appendix B

> The limitations placed on the claimant by [his doctors] restrict him to significantly less than a full range of sedentary work. . . .
>
> The claimant worked in the past as an auto body repairman, maintenance person, retail salesclerk, and reserve police officer. All of his past relevant jobs required an ability to perform at least light exertion on a sustained basis. *Because of his limitation to significantly less than a full range of sedentary work, he has been unable to engage in past relevant work since October 29. 1992. . . .*
>
> *Essentially, his residual functional capacity precludes all work activity on a full-time basis.* Considering the claimant's age, education, previous work experience, and residual functional capacity, . . . [the SSA regulation] establishes that the claimant is disabled. . . .
>
> *The claimant has been disabled, as defined by the Social Security Act, since October 29. 1992.*

(emphasis added).

On July 5, 1994, Griffith initiated suit in this court. On March 5, 1996, this court held a final pretrial conference and heard argument on defendant's original motion for summary judgment. The court denied defendant's motion for summary judgment; however, in view of the above information concerning Griffith's application for Social Security disability benefits — not available to Wal-Mart when its original motion for summary judgment was filed — the court continued the trial date and

ordered the parties to file briefs addressing the possible preclusive effect of the Social Security proceedings on Griffith's ADA claim. Those briefs are now before the court.

Finding that Griffith's representations in his applications for social security disability benefits preclude him from satisfying the elements of a prima facie ADA claim, this court now grants Wal-Mart's renewed motion for summary judgment.

ANALYSIS

The Americans With Disabilities Act ("ADA")

1. Griffith Must Establish That He Has Otherwise Qualified to Perform the Essential Functions of His Job.

Title I of the ADA, governing actions for employment discrimination against the disabled, prohibits discrimination against "a qualified individual with a disability because of the disability of such individual in regard to job application procedures, . . . hiring, advancement, or discharge . . . , compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

A "qualified individual with a disability," is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The term "essential functions" means the fundamental job duties of the employment position. 29 C.F.R. § 1630.2(n)(1) (1995).

In addition, the plaintiff must establish that he was qualified at the time of the job action in question. *Parker v. Metropolitan*

Life Ins. Co., 875 F. Supp. 1321, 1326 n.5 (W.D. Tenn. 1995) (citation omitted). It is irrelevant whether the plaintiff could perform the essential functions at some later date. *Cheatwood v. Roanoke Indus.*, 891 F. Supp. 1528, 1537 (N.D. Ala. 1995).

2. This Court Adopts the View that a Plaintiff's Representations in Applications for Long-Term Disability Benefits May Have a Preclusive Effect on His ADA Claim.

The majority of federal courts faced with the issue have ruled that an ADA plaintiff who has represented that he or she is disabled in order to obtain benefits under Long-Term Disability ("LTD") insurance, social security, or workers' compensation is not a "qualified individual" under the ADA as a matter of law. These courts reason that when an individual represents under oath in benefits applications that he or she was unable to perform the duties of his or her former job[3], the individual should be precluded from arguing in an ADA suit that he or she *was* capable of performing the essential functions of that job for the same period of time. As the court in *Reigel v. Kaiser Foundation Health Plan of N.C.*, 859 F. Supp. 963 (E.D.N.C. 1994), stated, in these circumstances, a plaintiff "cannot speak out of both sides of [his] mouth with equal vigor and credibility before this court." *Id.* at 970.

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3. A person is disabled under social security law if "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience engage in any other kind of substantial gainful work which exists in the immediate area in which he lives, or whether a specific vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 423(d)(2)(A).

Similarly, the district court in *Simo v. Home Health & Hospice Care,* 906 F. Supp. 714 (D.N.H. 1995), explained at length its rationale for barring a Rehabilitation Act plaintiff's claim:

> The plaintiff has made multiple factual representations to the SSA concerning her disabling condition and inability to work. The plaintiff attested to the veracity of each representation, knowing they would be relied upon in the context of a government benefits application process, a quasi-judicial administrative proceeding. Finding that plaintiff is "totally disabled" and "unable to work", the SSA approved the application and to date she has collected over five years worth of government benefits.
>
> The plaintiff, who continues to receive funds from the SSA, now seeks to recover under a civil rights statute which, by its express language, requires a showing that she is otherwise qualified to perform her former job as a homemaker. The very filing of the instant lawsuit . . . is totally inconsistent with the position she took before the SSA. . . . The integrity of the judicial system is jeopardized when litigants are permitted to assume contrary factual, not legal, positions for the purpose of achieving advantageous results. *The plaintiff, having already reaped the benefits of her past representations of total disability, may not now advance before this court any claim necessarily based on a contrary factual representation.*

Id. at 721 (internal quotations omitted) (emphasis added).

The treatment of such representations in ADA cases varies. Some courts invoke principles of strict judicial estoppel or treat the plaintiff's representations as binding admissions. *See, e.g. August v. Offices Unlimited. Inc.*, 981 F.2d 576, 581-84 (1st Cir. 1992) (plaintiff's statements to disability insurers were binding admissions that he could not perform the essential duties of his job, thus he was not a "qualified handicapped person" under Massachusetts disability law[4]); *Simo v. Home Health & Hospice Care*, 906 F. Supp. 714 (D.N.H. 1995) (invoking judicial estoppel doctrine to hold that plaintiff is barred from alleging facts necessary to make "otherwise qualified" showing on account of positions she took before SSA in disability proceeding); *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555 n.4 (D.Kan. 1995) (plaintiff with multiple sclerosis who on benefits applications affirmed that she was disabled from her former work was "estopped from claiming otherwise" in ADA suit).[5]

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4. The Massachusetts statute at issue in *August* defined a "qualified handicapped individual" in language nearly identical to the ADA.

5. *See also Beauford v. Father Flanagan's Boys' Home*, 831 F. 2d 768, 770-71 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988); *Cline v. Western Horseman, Inc.*, No. 94-D-1624, at *4 (D. Colo. 1996); *Reiff v. Interim Personnel Inc.*, 906 F. Supp. 1280, 1290-91 (D. Minn. 1995); *Smith v. Midland Brake. Inc.*, 911 F. Supp. 1351 (D. Kan. 1995); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995); *Cheatwood v. Roanoke Indus.*, 891 F. Supp. 1528, 1537-38 (N.D. Ala. 1995); *McNemar v. The Disney Store. Inc.*, No. 94-6997, 1995 WL 390051, at *3-4 (E.D. Pa. June 30, 1995); *Harden v. Delta Air Lines, Inc.*, 900 F. Supp. 493, 496-97 (S.D. Ga. 1995); *Berry v. Norfolk Southern Corp.*, No. 94-0075-R, 1995 WL 465819 (W.D. Va. June 23, 1995); *Kennedy v. Applause. Inc.*, No. 94-5344 SVW, 1994 WL 740765, at *3-*6 (C.D. Cal. Dec. 6, 1994). *Cf. Fussell v. Georgia Ports Authority*, 906 F. Supp. 1561, 1575-76 (agreeing with cases adopting strict estoppel theory and stating that the court is inclined to grant summary judgment to defendant on plaintiff's ADA claim, but allowing more discovery because record lacked direct evidence of substance of plaintiff's representations to SSA).

Indeed, this court indicated in *Hankins v. The Gap,* Civil Action No. 93-172 (E.D. Ky. 1995), *aff'd,* 1996 WL 279575 (6th Cir. May 29, 1996), that a plaintiff determined to be permanently and totally disabled for the purpose of receiving social security disability benefits would be unable to recover under the ADA for the time period during which she claimed to be disabled. *See id.* slip op. at 6 ("Plaintiff's current status as permanently and totally disabled, however, does not preclude plaintiff from seeking redress for disability based discrimination between . . . the effective date of the ADA . . . *and [the date] she was medically determined to be permanently disabled.*") (emphasis added).[6]

---

6. A similar approach has also been applied in actions involving other types of claims, where courts find that a plaintiff is estopped by prior representations of total disability from seeking any relief premised on his or her ability to work. *See, e.g., Brown v. National Railroad Passenger Corp.,* No. 86C10284, 1990 WL 119558 (N.D. Ill. 1990 Aug. 14, 1990) (holding that Title VII/ADEA plaintiff who represented to SSA and to Railroad Retirement Board that he could no longer work at his job is judicially estopped from seeking reinstatement and back pay).

The *Brown* court's reasoning is equally applicable in the ADA context:

> Brown's representations to the SSA and the RRB, coupled with his continued acceptance of disability benefits from both agencies, are irreconcilable with his position before this court. To allow Brown to assert that he was and is able to perform the duties of his employment with Amtrak at the same time that he is collecting disability benefits — awarded as a result of his representations that he could no longer work at his job or any other — would countenance a fraud, either on this court or on the two federal agencies that awarded him those benefits. Brown simply cannot play "fast and loose with the courts" or with administrative agencies acting in quasi-judicial capacities. This case falls squarely within the doctrine of judicial estoppel.

Id. at *6.

Other courts, however, consider prior representations of disability as only one factor to be weighed in determining whether the plaintiff is "otherwise qualified." *See. e.g. Pegues v. Emerson Electric Co.*, 913 F. Supp. 976, 980-81 (N.D. Miss. 1996) (holding that although a finding of disability for workers' compensation or social security purposes does not necessarily foreclose an ADA claim, the advancement of plaintiff's clearly inconsistent positions "is not legally proper").[7] Nevertheless, in all but one of these cases the evidence of the plaintiffs' statements was so persuasive that the courts granted defendants' motions for summary judgment.[8]

The cases that do not appear to give any preclusive effect to the receipt of disability benefits in a subsequent disability discrimination suit are factually distinguishable from the majority approach and from the case at bar. In *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992), for instance, the plaintiff suffered from an emotional illness and was found eligible for social

---

7. *See also Morton v. GTE North Inc.*, No. 3:94-CV-0424-P, 1996 WL 84830, at *7-8 (N.D. Tex. Jan. 23, 1996); *Dockery v. North Shore Medical Center*, 909 F. Supp. 1550, 1559 (S.D. Fla. 1995); *Anzalone v. Allstate Insurance Co.*, No. 93-2248, 1995 WL 35613 (E.D. La. Jan. 30, 1995); *Reigel v. Kaiser Foundation Health Plan of N.C.*, 859 F. Supp. 963 (E.D.N.C. 1994).

8. In *Anzalone, supra*, the court denied the employer's motion for summary judgment on the grounds that the plaintiff, an insurance claims adjuster, had "not unambiguously characterized himself as totally and completely disabled." *Id.* at *1. Specifically, the court relied on the fact that plaintiff and his doctor had consistently taken the position that the plaintiff could work with certain restrictions (such as working from home) and that he had "presented sufficient evidence of his ability to perform the essential functions of an insurance claims adjuster to withstand summary judgment as a matter of law." *Id.* at *2.

security disability benefits even before he was hired by the defendant, the EPA. When the EPA terminated the plaintiff, he sued, alleging that the EPA fired him on account of his disability. In reversing the grant of summary judgment to the EPA, the Seventh Circuit rejected the district court's reliance on the finding of the SSA that the plaintiff was entitled to disability benefits:

> Further, even if a finding of disability could have preclusive effect in a private lawsuit, such a finding is consistent with a claim that the disabled person is "qualified" to do his job under the Rehabilitation Act. *First, the SSA may award disability benefits on a finding that the claimant meets the criteria for a listed disability, without inquiring into his ability to find work within the economy. . . . As it turns out, the SSA granted benefits to [the plaintiff] on this basis.* Second, even if the SSA had looked into Overton's ability to find work in the national economy, its inquiry would necessarily be generalized. The SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do. In sum, the determination of disability may be relevant evidence of the [plaintiff's] handicap, but it can hardly be construed as a judgment that [the plaintiff] could not do his job at the EPA.

Id. at 1196 (emphasis added).

Thus, the *Overton* court's refusal to give preclusive effect to the plaintiff's receipt of social security benefits was based on its recognition that the criteria employed by the SSA in that particular

case — the plaintiff's automatic qualification for benefits based on the nature of his disability and the resulting limited inquiry into his employability — were not dispositive, particularly in the face of evidence that the plaintiff had performed many of his job duties at the EPA satisfactorily. *Id.*

Importantly, *Overton* did *not* involve representations by the plaintiff that he was disabled and unable to perform his job. The case is thus distinguishable from those where the estoppel or admission theory precludes an ADA plaintiff from taking a position absolutely at odds with prior (sometimes even simultaneous) representations to government agencies or insurance carriers. *See Smith v. Midland Brake Inc.*, 911 F. Supp. 1351, 1359 (D. Kan. 1995) ("The case law is clear that it is the plaintiff's inconsistent representations which have preclusive effect."); *Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1290-91 (D. Minn. 1995) (distinguishing *Overton* from facts before it where plaintiff "by his own statements and through his authorized physician" represented that he could not perform the duties of his job); *Kennedy v. Applause, Inc.*, No. 94-5344 SVW, 1994 WL 740765, at *6 n.6 (C.D. Cal. Dec. 6, 1994) ("The cases relied upon by the Court place more emphasis on the statements made by a plaintiff for the purposes of obtaining disability benefits as opposed to the decisions of the relevant agencies regarding provision of benefits.").

Other cases relied on by Griffith declining to give preclusive effect to the receipt of disability benefits are similarly distinguishable. In *Smith v. Dovenmuehle Mortgage, Inc.*, 859 F. Supp. 1138 (N.D. Ill. 1994), the court denied defendant's motion for summary judgment, finding that judicial estoppel did not apply because an issue of fact existed as to whether or not the position taken by the plaintiff in front of the SSA was

inconsistent with his position in his ADA suit. Important to this outcome, however, was the fact that both the plaintiff and his doctor argued that he had since recovered from his disability; thus, the court found that "plaintiff has offered a plausible explanation for the divergence between his representation to the SSA and the arguments he is making now." *Id.* at 1142.[9]

Similarly, in *Kupferschmidt v. Runyon,* 827 F. Supp. 570 (E.D. Wisc. 1993), the court simply held that the receipt of social security disability benefits, *per se*, did not preclude the plaintiff from proving that she could perform the essential function of her job. *Id.* at 574.[10] Lastly, in *Lawrence v. United States I.C.C.*, 629 F. Supp. 819 (E.D. Pa. 1985), the court found no contradiction between the plaintiff's representations to the SSA and his ADA claim because the former consisted only of his assertion that he could not perform *all* the functions of his prior job, not that his disability prevented him from working at all. *Id.* at 822.

---

9. The *Smith* court's focus on whether the plaintiff was qualified to perform his job at the time of the suit appears erroneous because the clear language of the ADA makes the relevant inquiry whether or not the plaintiff was "otherwise qualified" at the time of the employment action in question, not at some later date. *See Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321, 1326 n. 5 (W.D. Tenn. 1995).

10. The *Kupferschmidt* court noted that the record did not include evidence of the essential functions of the plaintiff's job or the administrative record from her social security case. Thus, the court had no way to compare any representations made by the plaintiff with the actual requirements of the job for which she argued that she was otherwise qualified.

Appendix B

3. Griffith's Representations of Disability Preclude Him From Asserting That He Has Otherwise Qualified to Perform the Essential Functions of His Position at Wal-Mart.

As described earlier in this opinion, the ALJ's decision awarding Griffith social security disability benefits reflects extensive reliance on Griffith's own representations of the limitations caused by his back condition. There is, however, an irreconcilable inconsistency between those representations and Griffith's current claim that at the time Wal-Mart terminated him, he was "otherwise qualified" to perform the essential functions of his job.[11] The physical demands of the Wal-Mart Sales Associate position, described in a Wal-Mart employee booklet, include:

- The Associate is regularly required to walk or stand.
- The Associate must frequently lift and/or move objects weighing at least 25 and up to 50 pounds (lbs.).
- The Associate will occasionally be required to bend, twist or squat.

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11. Although Griffith stated in his SSA application that he was "let go" by Wal-Mart on October 29, 1992, he was actually terminated on October 26, 1992. This discrepancy appears to be a mistake. Nevertheless, even if Griffith were to argue that the SSA only found him to be disabled as of the 29th rather than the 26th, the difference would be immaterial for the purposes of this suit because Griffith offers no evidence "that remotely suggests anything happened [between the two dates which would explain why [he] was disabled as of the later date but not the earlier date." *Nguyen v. IBP. Inc.*, 905 F. Supp. 1471, 1485 n. 7 (D. Kan. 1995).

- The Associate will be required to reach above shoulder height and below waist level.

The inconsistencies between these job requirements and Griffith's representations about his disability preclude Griffith from raising an issue of fact as to whether, on the date he was terminated by Wal-Mart, he was a qualified individual under the ADA. *See Kennedy v. Applause, Inc.*, No. 94-5344 SVW, 1994 WL 740765, at *5-*6 (C.D. Cal. Dec. 6, 1994) (describing plaintiff's responses on SSA "Daily Activities Questionnaire" and concluding that were incompatible with ADA claim). Moreover, the fact that Griffith himself never used the phrase "totally disabled" is immaterial. *See Brown v. National Railroad Passenger Corp.*, No. 86C10284, at *6 (N.D. Ill. 1990) ("In the Disability Report [the plaintiff] represented that she had disabling conditions, that the conditions stopped her from working. That she never used the term 'totally disabled' is of no consequence. Total disability is a necessary inference from the numerous ailments and consequences she recites.").

Because he is precluded from proving that he was "otherwise qualified" to perform the essential functions of his position at Wal-Mart, Griffith cannot make out a prima facie case under the ADA. Wal-Mart is thus entitled to summary judgment on this claim.

CONCLUSION

Therefore, the court being advised, it is **ORDERED** as follows:

(1) Defendant's renewed motion for summary judgment on plaintiff's ADA claim (doc. #87) be, and it is hereby,

GRANTED. Plaintiff's ADA claim is dismissed with prejudice.

(2) Plaintiff's motion for partial summary judgment and adjudication of noncontroverted facts (doc. #91) be, and it is hereby, **DENIED**.

(3) The court declines to exercise its discretion under 28 U.S.C. § 1367 to assert supplemental jurisdiction over plaintiff's state law claims raised under the Kentucky Equal Opportunities Act, KRS 207.130 *et seq.*, and the common law of Kentucky. These claims, therefore, are dismissed without prejudice.

(4) Defendant's motion to dismiss plaintiff's state law claims (doc. #92) is **DENIED AS MOOT**.

A separate judgment shall enter concurrently herewith. This 10th day of June, 1996.

s/ William O. Bertelsman
WILLIAM O. BERTELSMAN, CHIEF JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 11, 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-6361

CLYDE N. GRIFFITH,

Plaintiff-Appellant,

v.

WAL-MART STORES, INC.,

Defendant-Appellee.

ORDER

BEFORE: RYAN and BATCHELDER, Circuit Judges; and CAMPBELL*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

* Hon. Todd J. Campbell, United States District Judge for the Middle District of District of Tennessee, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUL 8 1998
OFFICE OF THE CLERK

No. 97-1991

In The

Supreme Court of the United States

October Term, 1997

WAL-MART STORES, INC.,

Petitioner,

vs.

CLYDE N. GRIFFITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Americans with Disabilities Act, is an employer entitled to summary judgment on the issue of the employee's ability to perform the essential functions of the job when the employer in documentary evidence, sworn deposition testimony, and its Petition for Writ, admits that the employee, who subsequently successfully applied for and received Social Security disability benefits, can do the essential functions of the job?

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari inadvertently misidentifies the respondent as Clyde E. Griffith. Respondent's correct name is Clyde N. Griffith.

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INTRODUCTION

This is a unique case in which Wal-Mart admits that Mr. Griffith can do the essential functions of his Wal-Mart job. Petition, p 4. In spite of this admission, Wal-Mart argues that no reasonable jury can find that Griffith can do the essential functions of his job because Griffith has subsequently successfully applied for Social Security disability. The Sixth Circuit correctly held that where the defendant admits and the evidence shows that the employee can do the essential functions of the job the employer is not entitled to summary judgment that the employee cannot do the essential functions of the job.

STATEMENT OF THE CASE

I. Griffith Obtains Employment With Wal-Mart In 1990.

Mr. Griffith worked for Wal-Mart from October 3, 1990 until his termination on Monday, October 26, 1992. (Apx 69) He had a good work record, free from any major disciplinary matters.

Mr. Griffith initially started working for Wal-Mart in October 1990 as a sales associate in the sporting goods department. Because of a previously-existing back disability, Griffith was unable to do the sporting goods job. Therefore, around January 1991, he was transferred to the hardware department. Griffith worked in the hardware department from 1991 until September 1992. **Griffith was able to do the essential functions of the hardware department job.** (Apx 348) Although the hardware job

may not have been a statistically noticeable job in the economy, it was a job which Griffith could do. 42 USC 423(d)(2)(A)

In September/October 1992, Griffith was removed from the hardware department and transferred to the sporting goods department. The sporting goods department job was not compatible with Griffith's disability. (Ibid)

II. Wal-Mart Repeatedly Gives Mr. Griffith Satisfactory Appraisals.

Mr. Griffith received satisfactory appraisals because he could do the essential functions of his job. The October 1992 review indicated under "overall performance . . . **has a good attitude and works well with customers.**" (Apx 136) (Emphasis added) The October 1991 evaluation indicated "had **good initiative, . . . good worker, follows instructions very well, . . . has good work skills**, follows instruction with minimum follow-up, . . . **good efforts-**, tries to do his best . . . **very dependable** . . . has good knowledge of the department . . . **works very well with management and other associates.**" (Apx 131-134) (Emphasis added) The January 1991 evaluation indicated "productivity is pretty good . . . **attendance is very good-** . . . willing to help out wherever needed – very flexible . . . good customer assistance . . . friendly and helpful associate. **Very good with customers and associates.**" (Apx 124-125) (Emphasis added) The April 1991 evaluation stated "very good with customers." Regarding communication and shrinkage control, "does a good job."

"**Grif is very good with customers, [and] has a sense of pride.**" (Emphasis added) (Apx 129-130)

III. Wal-Mart Admits That Mr. Griffith Was Qualified For His Wal-Mart Employment

As indicated in Wal-Mart's February 1996 Memorandum [Apx 82], "[Griffith] was still capable of performing the essential functions of his sales associate position by obtaining assistance from another sales associate. Greer Depo pp 19 [Apx 762], 36 [Apx 764], 37 [Apx 765])"

Wal-Mart further stated:

> "There is no evidence to demonstrate Plaintiff Griffith was ever disqualified from performing the essential functions of a sales associate position at Wal-Mart. **Plaintiff Griffith has failed to show he became disqualified for any type of employment while at Wal-Mart.**" (Apx 90) (Emphasis in the original)

Wal-Mart's Petition admits Mr. Griffith "was able to perform the essential functions of [the hardware department] job." (Petition, p 4)

IV. Wal-Mart Fires Mr. Griffith In October, 1992

On September 21, 1992, Griffith's attorney wrote a letter to Store Manager Larry Greer indicating, in part, that:

> "As you are aware, Mr. Griffith is a handicapped individual. . . . If you would like to discuss this matter further, please give me a call at my office or write me at any time." (Apx 341-342)

Mr. Greer never responded to the letter. Rather, Mr. Greer fired Griffith approximately one month later, on October 26, 1992. (Apx 342)

Mr. Griffith was not at work during the week of October 19, 1992. Griffith's assistant store manager told Griffith that he did not have to return to work until Monday, October 26, 1992. (Apx 348) When Griffith appeared for work on Monday, October 26, 1992, he was discharged by Wal-Mart purportedly for not returning to work on the prior Saturday.

V. Thereafter, No Employer Would Hire Mr. Griffith Because Of His "Condition And Restrictions."

As indicated by Griffith in his Social Security disability application:

> "Question 3b: Explain how your condition keeps you from working.
>
> Answer: **No employer will hire me because of my condition and restrictions.**" (Apx 551)

VI. Mr. Griffith Was Qualified For His Wal-Mart Employment

Wal-Mart had an opportunity, from 1990 to 1992, to constantly evaluate Griffith's work performance. Wal-Mart consistently evaluated plaintiff's work performance as, at least, satisfactory.

Wal-Mart's consistently good evaluations of Mr. Griffith's job performance and Store Manager Greer's testimony confirm that Griffith was performing his job

" 'at a level which met his employer's legitimate expectations.' " *McDonald v. Union Camp Corp*, 898 F2d 1155, 1160 (6th Cir 1990). See generally, Petition for Writ, p 4.

VII. Mr. Griffith Applies For Disability Benefits From The Social Security Administration In A Nonadversarial Proceeding.

Mr. Griffith applied for Social Security Administration benefits in May 1993. (Apx 550) Without a hearing and in a nonadversarial proceeding, a Social Security administrative law judge determined in July 1994 that Griffith was entitled to benefits. (Apx 567-570)

VIII. District Court Grants Summary Judgment To Wal-Mart And Sixth Circuit Reverses

The United States District Court for the Eastern District of Kentucky granted summary judgment to Wal-Mart on Griffith's claims under the ADA. The district court held that Griffith was precluded from showing that he was capable of performing the essential functions of the job because he had represented that he was totally disabled in order to obtain disability benefits. 930 F Supp 1167 (ED Ky 1996)

On appeal, the Sixth Circuit gave several reasons why judicial estoppel should not apply.

> "The precise question of whether the applicant could have worked with a reasonable accommodation during the relevant period is not asked in a Social Security context because . . . it would not necessarily bar receipt of those benefits." 135 F3d 376, 382 (6th Cir 1998)

Statements made in SSA applications "are open to interpretation," *Id*, and should be considered in context, the Sixth Circuit said. Because applicants are asked to check off boxes without comment or fill in blanks with little room for elaboration, "the employee may not have a fair opportunity to accurately explain the details of the employee's medical condition and his ability or inability to work for purposes of the ADA." *Id.*

The court added that applying judicial estoppel, an equitable doctrine,

> "under the circumstances presented here would be inappropriate given that the truth-seeking function of the court would be supplanted by an agency administrative decision rendered without an evidentiary hearing. . . . We believe these prior statements should not be the subject of judicial estoppel or a theory of 'super admissions,' but rather should be analyzed under traditional summary judgment principles." *Id* at 382-383.

The court concluded that summary judgment was improperly granted to Wal-Mart because Griffith raised a genuine issue of material fact as to whether he was capable of performing the essential functions of his job with reasonable accommodation. The company admitted that Griffith was able to perform his job in the hardware department and that it was able to accommodate his physical restrictions, the court pointed out. Griffith argued that his seemingly inconsistent statements were made ten months after he was fired, when his condition had worsened.

REASONS FOR DENYING THE WRIT

The Courts of Appeal which have considered the issue before the Court unanimously agree that a claimant's sworn assertions made to the Social Security Administration ("SSA") are relevant in assessing whether the claimant is a qualified individual with a disability under the Americans with Disabilities Act ("ADA"). Regardless of whether the court applies judicial estoppel or simply uses a traditional summary judgment analysis, the Circuits uniformly make their decisions based upon the claimant's assertions **in light of all of the available evidence.** Thus, review by this Court of the present case will not eradicate the need in the future for the case-by-case factual analysis employed to resolve this and similar claims.

I. The Circuit Split Is More Form Than Substance

The Third Circuit initially held that a plaintiff who certifies total disability on an application for benefits is judicially estopped from bringing an ADA claim. *McNemar v. Disney Store, Inc*, 91 F3d 610 (3rd Cir 1996), *cert denied*, ___ US ___, 117 SCt 958, 136 LEd2d 845 (1997). In *McNemar*, the plaintiff was terminated from his position as assistant manager for theft after divulging that he was HIV positive. McNemar then applied for SSD benefits and stated on the standardized application form that he was totally disabled and unable to work as of five weeks prior to his discharge. He made similar statements on applications for forbearance of student loan payments and state disability benefits. Shortly thereafter, McNemar brought disability claims against Disney under the ADA

and state law. The district court dismissed the disability claims on judicial estoppel grounds. The Third Circuit affirmed. According to the Third Circuit "[c]learly McNemar has asserted inconsistent positions regarding his ability to work." *Id* at 618. He certified in his applications for benefits that he was totally and permanently disabled and unable to work and earn money; but in his disability claims he stated he could perform the essential functions of his job. *Id*. Accordingly, the court held that the district court properly applied the doctrine of judicial estoppel.

In *Krouse v. American Sterilizer Co*, 126 F3d 494 (3rd Cir 1997), Judge Becker, writing for a panel of the Third Circuit, responded to the "considerable criticism" of the *McNemar* decision and indicated that *McNemar* articulated a relatively fact-specific holding. *Id* at 502 n3 and 503 n5. The district court in *Krouse* granted summary judgment on the ground that the plaintiff was judicially estopped from establishing the qualifications element of his ADA claim. Although the Third Circuit affirmed on different grounds, the court stated in a footnote that "district courts in this circuit are misapplying *McNemar* without first considering the unique facts of that case." *Id* at 503 n5. The court instructed that "[c]ourts should not assume that *McNemar* always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record." *Id*. Another footnote stated that "Judge Becker is persuaded . . . that *McNemar* was wrongly decided, and believes that the court should reconsider it at its first opportunity." *Id* at 503 n4.

Taking into consideration the *Krouse* court's discussion of *McNemar*, it appears that no court of appeals has adopted the position that a plaintiff who has claimed total disability on a benefits application is **per se** estopped from claiming he or she could work with reasonable accommodations under the ADA. **This is especially the case where the employer has admitted that the employee can do the essential functions of the job.** Petition for Writ, p 4.

The District of Columbia Circuit has held that representations on an application for disability benefits are merely one piece of evidence that an ADA plaintiff is not "qualified," rather than an absolute bar. See *Swanks v. Washington Metro Area Transit Authority*, 116 F3d 582 (DC Cir 1997). In *Swanks*, the plaintiff, who suffered from spinal bifida, sought and received SSD benefits after he was fired from his job as a police officer with the Transit Authority. Swanks then filed an ADA claim alleging that the Authority refused to accommodate his disability and then fired him because of it. The district court entered summary judgment for the Authority because Swanks' "disability determination renders [him] unqualified for the position which he held either as it was or with a reasonable accommodation . . . ." *Id* at 584. The court of appeals reversed.

The court of appeals began by outlining the SSD application process. *Id* at 584-85. Under the Social Security Act, an individual is entitled to disability benefits if the claimant's physical or mental impairment or impairments are of such severity that the claimant is not only unable to do the claimant's previous work but cannot, considering his age, education, and work experience,

engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him. 42 USC 423(d)(2)(A). **The Social Security Act does not address the effect of a reasonable accommodation on a claimant's disability status.** In administering the Act, the SSA has developed a five-step procedure for evaluation of disability claims. 20 CFR 404.1520. The five steps are as follows:

> I. The SSA ascertains whether the claimant is currently engaged in "substantial gainful activity." If so, the agency denies the application. If not, it proceeds to step two.
>
> II. The agency determines whether the claimant has a "severe" impairment. If not, the application is denied. If so, the agency proceeds to step three.
>
> III. The agency checks whether the impairment is listed as presumptively disabling in the regulations. If the claimant's condition is listed, the agency awards with no further inquiry. If the condition is not listed, the agency proceeds to step four.
>
> IV. The agency determines whether the claimant is able to perform his past work. If so, benefits are denied. If not, the agency proceeds to the final step.
>
> V. Considering the claimant's age, educational experience, past work experience, and residual functional capacity, the agency determines whether the claimant can do "other work," i.e., jobs "that exist in significant number in the national economy." 20 CFR 1560(c). If so, the

> agency denies the application. If not, the agency awards benefits. In fact, under the fifth step, for a claimant who has shown that he or she cannot perform past relevant work, the SSA will find that claimant disabled for Social Security benefits even if the claimant can perform the full range of unskilled sedentary and light work, as defined under 20 CFR 404.1567 (a) and (b), if the claimant is over 55 years old and has less than a high school education and has done unskilled work. See Rules 201.01 and 202.01, Appendix 2, 20 CFR Part 404. In addition, under 20 CFR 404.1592(a), a beneficiary of SSD benefits may engage in a trial work period for up to nine months, to see if the person is capable of working, while still receiving full Social Security disability benefits.

The SSA has issued an Information Memorandum explicitly stating that, for the purpose of the fifth step assessment, "[w]hether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual would not be relevant." Daniel L. Skoler, Assoc Comm'r, SSA, Disabilities Act Info Mem at 3, (June 2, 1993) (No SG3P2). The Memorandum also stresses that "[h]ypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job would not be appropriate." *Id.*

The *Swanks* court pointed out that "[n]owhere in this five-step process does the Social Security Administration take account of the possible effect of reasonable accommodation on a claimant's ability to work." *Swanks*, 116 F3d at 585. A claimant can be found disabled at the third step if she has a "listed" impairment, with no inquiry into

her actual ability to work. In addition, a claimant can be deemed eligible for benefits at the fifth step, where the inquiry focuses on the general availability of particular types of work and **not on whether a reasonable accommodation would enable a claimant to work**. In short, an individual can meet the requirements for SSD eligibility and still be a "qualified individual with a disability" under the ADA. The *Swanks* court recognized that there is no inherent inconsistency. Both the SSA and the EEOC have taken the position that there is no inherent inconsistency. See *Swanks, id* at 586.

The *Swanks* court declined to apply estoppel in all such cases in favor of a case-by-case inquiry that examines the specific statements a disability discrimination plaintiff makes in connection with applications for disability benefits.

In *Cleveland v. Policy Mgmt Sys Corp*, 120 F3d 513 (5th Cir 1997), *petition for cert filed*, 66 USLW 3435 (US Dec 15, 1997) (No 97-1008) the Fifth Circuit held that there is a "**rebuttable** presumption" that an applicant for or recipient of SSD benefits is not a "qualified individual with a disability." *Id* at 518. (Emphasis added) The court stopped short of holding that all SSD applications should create an estoppel. "It is at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive . . . " *Id* at 517. In *Dush v. Appleton Elec Co*, 124 F3d 957 (8th Cir 1997), the Eighth Circuit ruled that an ADA plaintiff who had characterized herself as "totally disabled" in a previous workers' compensation proceeding failed to present evidence showing she was a "qualified individual with a disability." The court declined to

hold that judicial estoppel precluded all such plaintiffs from proceeding with an ADA claim.

Still other courts of appeals presented with this question have limited themselves to the facts of their cases, without articulating any broad rules. See *D'Aprile v. Fleet Servs Corp*, 92 F3d 1, 4, (1st Cir 1996) (ADA plaintiff's statements on application for disability benefits "may not have constituted [a] broad admission of incapacity," so the ADA claim was not automatically barred); *Weigel v. Target Stores*, 122 F3d 461, 466-67 (7th Cir 1997) (explaining that an SSA total disability determination, while relevant, is not dispositive of the issue of an ADA claimant's status as a "qualified individual with a disability"). See EEOC Enforcement Guide entitled "Effect of Representations Made in Applications for Disability Benefits on the Determination of Whether a Person is a 'Qualified Individual With a Disability' Under the Americans with Disabilities Act of 1990 (ADA)," reprinted in BNA's Americans With Disabilities Act Manual No 62 at 70:1251; http://www.eeoc.gov/docs/qidreps.txt.

II. The Sixth Circuit's Holding Is Reasonable And Appropriate

The Sixth Circuit *Griffith* decision is completely consistent with the holdings of its sister circuits that a certification of total disability on an SSD benefits application is not inherently inconsistent with being a "qualified individual with a disability" under the ADA. See *Talavera v. School Board of Palm Beach Cty*, 129 F3d 1214 (11th Cir 1997). This is especially the case where the employer, as Wal-Mart did in this case, has admitted that the employee

can do the essential functions of the job. Petition, p 4. **Indeed, it is difficult to understand how, in a reasoned legal environment, a corporation can admit, as Wal-Mart has repeatedly done in this case, that an employee can do the essential functions of the job and yet try to argue with a straight face that it is entitled to summary judgment on the purported basis that there is no genuine issue of material fact that the employee can do the essential functions of the job.**

The *Griffith* decision is completely consistent with and mandated by Sixth Circuit law. The issue of judicial estoppel had already been decided in Mr. Griffith's favor. In *Blanton v. Inco Alloys Int'l, Inc*, 123 F3d 916, 917 (6th Cir 1997), the Sixth Circuit held:

> "We agree with the DC Circuit's opinion in *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F3d 582 (DC Cir 1997), that holds that the receipt of disability benefits does not preclude subsequent ADA relief and rejects the doctrine of judicial estoppel, but does allow the consideration of prior sworn statements by the parties as a material factor."

Judicial estoppel does not apply where the prior proceeding was an uncontested nonadversarial administrative proceeding. *Edwards v. Aetna Life Ins Co*, 690 F2d 595, 598 (6th Cir 1982). Social Security administrative proceedings are not adversarial. *Sullivan v. Hudson*, 490 US 877, 891, 109 SCt 2248, 2257, 104 LEd2d 941 (1989); *Willis v. Sullivan*, 931 F2d 390, 400 (6th Cir 1991).

The issue in the *Griffith* case is whether there is a genuine issue of material fact that Mr. Griffith could do his Wal-Mart hardware department job. Wal-Mart says he

could. Larry Greer was Mr. Griffith's Store Manager. Store Manager Greer confirms that:

> "Q. Were there any problems with Mr. Griffith's job performance in the Hardware Department?
>
> A. No, sir." (Apx 763)

Store Manager Greer further testified that:

> "Q. Were there ever any complaints of Mr. Griffith while he worked in the Hardware Department?
>
> A. Not that I can remember at this point, no." (Apx 768)

* * *

> **"A. He could do the Hardware job as I understand it, the way we modified it, he had no problem doing it the way we had modified the job."** (Apx 768) (Emphasis added)
>
> "Q. So Mr. Griffith always gave what you were looking for?
>
> A. Yes, sir.
>
> Q. You never received any complaints about Mr. Griffith's job performance?
>
> A. I personally did not, nō, sir.
>
> Q. Or heard of any complaints?
>
> A. About his job performance?
>
> Q. Yes, sir.
>
> A. No, sir." (Apx 759, District Manager Jim Coln)

> **"He did the things that he was supposed to be doing in the Hardware Department."** (Apx

849; Asst. Store Manager Steve Kissabeth) (Emphasis added)

In September 1992, Wal-Mart transferred Mr. Griffith from the hardware department to the sporting goods department. Wal-Mart has given inconsistent reasons for this transfer. Wal-Mart told the EEOC on March 15, 1993:

> "Charging Party moved to Sporting Goods in October [1992] to help during the hunting/fishing seasons . . . ." (Apx 355)

Wal-Mart's district manager Jim Coln testified:

> "Q. So basically Mr. Greer told you that Mr. Griffith was being transferred to Sporting Goods, department nine, to accommodate Mr. Griffith because of the lifting restrictions?
>
> A. Yes. Mr. Griffith had doctor's restrictions on what he could lift." (Apx 752)

The "inconsistency" of these statements and reasons are evidence of discrimination. *Tinker v. Sears, Roebuck & Co*, 127 F3d 519, 523 (6th Cir 1997), *Edwards v. US Postal Service*, 909 F2d 320, 324 (8th Cir 1990), *Schmitz v. St. Regis Paper Co*, 811 F2d 131, 132-133 (2nd Cir 1987).

After the discriminatory transfer to the sporting goods department, Mr. Griffith's attorney protested this disability discrimination to Store Manager Larry Greer on September 21, 1992. (Apx 148-149) Hardly a month later, Wal-Mart fired Mr. Griffith for pretextual reasons. A person's status as a "qualified individual with a disability" is not relevant in assessing the person's claim for retaliation under the ADA. *Krouse v. American Sterilizer Co*, 126 F3d 494 (DC Cir 1997); *Brewer v. Petroleum Suppliers*, 946 F Supp 926 (ND Al 1996); 42 USC 12203(a).

After the discharge, Mr. Griffith attempted to get vocational training. (Apx 538)

When Mr. Griffith finally applied for Social Security disability the Disability Report indicated:

"DISABILITY REPORT:

Explain how your condition now keeps you from working?

No employer will hire me because of my condition and restrictions." (Apx 551)

The Remarks Section indicated:

"Due to my back condition, I would like to claim benefits until I finish my education at Northern Kentucky University. With all of my restrictions, no employer will hire me. I have apply at least thirty employers and somebody else got hire, who was in excellent health and have no limitation." (Apx 556)

The Social Security Administration indicated on August 30, 1993:

"The claimant said his problems with depression began in September of 1988 when his mother died. He said his condition has worsened in the past 3-4 months because he can't find a job. He said people have turned him down because of his lower back injury. He said he has applied for jobs he felt he could do then never heard anything or he has been told he would be a liability to them." (Apx 571)

Based on Wal-Mart's admissions that Mr. Griffith could do the hardware department job and Mr. Griffith's statements in his Social Security documents that he was

looking for work and was unable to work because employers turned him down, a reasonable jury could find that Mr. Griffith was qualified for his hardware department job.

A reasonable jury could find that Mr. Griffith was qualified to do the essential functions of his Wal-Mart job for the simple reason that Wal-Mart admits that Mr. Griffith could do the job. The Sixth Circuit did nothing other than comply with Civil Rule 56 in holding that there were genuine issues of material fact in light of Wal-Mart's consistent admissions that Mr. Griffith could do the essential functions of his Wal-Mart job.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

WAL-MART STORES, INC.,

Petitioner,

vs.

CLYDE N. GRIFFITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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Wal-Mart Stores, Inc. ("Wal-Mart"), has previously filed a Petition requesting that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Respondent has filed a Brief in Opposition and this Reply brief is filed, pursuant to Supreme Court Rule 15(6), to respond to the new points raised by Respondent and cite new decisions rendered since the Petition was filed.

FURTHER REASONS FOR GRANTING THE WRIT

I.

MR. GRIFFITH SHOULD BE BOUND BY HIS SWORN STATEMENTS.

Respondent makes much of the alleged "admission" by Wal-Mart that Mr. Griffith could perform the essential functions of his job at Wal-Mart. This is a mischaracterization of the evidence and ignores Mr. Griffith's own sworn statements to the contrary. Mr. Griffith's ability to do the job while working at Wal-Mart was never an issue in this action. Wal-Mart accommodated all disabilities reported by Mr. Griffith. However, by virtue of his own sworn statements in filings with the Social Security Administration ("SSA"), Mr. Griffith created this issue. By those statements, Mr. Griffith clearly admitted facts that establish he was not "otherwise qualified" and therefore, not entitled to the protection of the Americans With Disabilities Act ("ADA").

Wal-Mart has truthfully admitted throughout this litigation that **while he was an employee**, Mr. Griffith was capable of performing the essential functions of his job. But Mr. Griffith told the SSA that he is no longer able to perform the essential functions of the job. This is precisely the point. If what Mr.

Griffith said in his various filings with the SSA is true, as he swore it to be true, as a matter of law he cannot perform the essential functions of the job at Wal-Mart and no reasonable jury could so find.

The Respondent's Brief in Opposition simply ignores Mr. Griffith's sworn statements:

> Question: Have you ever done any work outside your home? *If no*, what has kept you from doing the public work? *If yes*, where and when did you last work, for how long, and why did you stop working?
>
> Answer: No! **With my back injury, I can only stand for about 10 minutes at a time.** My back is getting worse.

SSA "Activities of Daily Living" questionnaire (August 1993).

> Question: Describe any physical or mental limitations you have as a result of your condition since you filed your claim.
>
> Answer: **No lifting, standing, walking or sitting for more than 10 [minutes] at a time.**
>
> Question: Describe any physical or mental limitations you have as a result of your condition since you filed your claim.
>
> Answer: **No lifting, standing, walking or sitting for more than 10 [minutes] at a time.**

SSA "Reconsideration Disability Report" (August 1993).

These sworn statements are inconsistent with what Wal-Mart observed concerning Mr. Griffith's abilities at the time he was working at Wal-Mart. However, if they are true, as Mr. Griffith has sworn, they are clearly incompatible with Wal-Mart's job requirements. No job could be devised or amended by Wal-Mart to accommodate Mr. Griffith. Mr. Griffith should not be allowed the opportunity to argue and attempt to prove to a jury that his own sworn statements to the SSA are false.

II.

THERE IS A GENUINE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS.

Respondent argues that the split among the Circuit Courts of Appeals outlined in Petitioner's Brief is "more form than substance." (Brief in Opposition pp. 7-13.) Respondent claims that the Circuit Courts of Appeals "uniformly make their decisions based upon the claimant's assertions in light of all of the available evidence." (Brief in Opposition p. 7.) This argument is simply wrong. The courts that apply the theory of judicial estoppel do not engage in a review of all the evidence and then evaluate whether the claimant has sufficient evidence to proceed to a jury trial. *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3rd Cir. 1996), *cert. denied*, __ U.S. __, 1175 S. Ct. 958, 136 L. Ed. 2d 845 (1997). To the contrary, strict application of judicial estoppel means the court simply looks at whether the claimant made representations or statements to the SSA that he or she was totally disabled and unable to work. If the claimant has made such assertions, the court looks no further; judicial estoppel applies to preclude evaluation of any additional facts. *Id. See also, August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992).

A new decision from the Fourth Circuit also adopts the theory of judicial estoppel in a case involving a claimant who

asserted disability to the SSA, but claimed to have been able to work for purposes of her ADA case. *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 WL 390834 (4th Cir. June 29, 1998). The Fourth Circuit opinion discusses and accepts the use of judicial estoppel in this type of case, but found that the prerequisites for the application of judicial estoppel were not met concerning this particular claimant.

Even those Circuit Courts of Appeals that do not strictly apply judicial estoppel do not simply "weigh the evidence". Instead, these courts hold that the claimant is bound by the sworn statements made to the SSA and is not permitted, in the context of an ADA case, to try and prove those statements were false. *See, e.g., Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998); *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 15, 1997) (No. 97-1008) ("It is at least theoretically conceivable that under some limited and highly unusual set of circumstances, the two claims would not necessarily be mutually exclusive.)

Application of judicial estoppel to the facts of this case would result in a holding that Mr. Griffith, having sworn to the SSA that he could not lift, stand, sit or walk for more than ten minutes would be bound by that statement. Applying judicial estoppel would preclude Mr. Griffith from trying to prove to a jury that, despite his statements to the SSA, he could in fact successfully work at Wal-Mart.

This approach is to be contrasted with the approach adopted by the Sixth Circuit in this case. In this case, the Sixth Circuit did simply weigh the evidence and determine that the claimant should be allowed to proceed to a jury trial despite the statements he made in an effort to obtain disability benefits from the SSA. Circuit Courts of Appeals that follow this approach include the

Sixth, Seventh, Eleventh and District of Columbia Circuits. *Griffith v. Wal-Mart*, 135 F.3d 376 (6th Cir. 1998); *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997); *Weigel v. Target Stores, Inc.*, 122 F.3d 461 (7th Cir. 1997); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582 (D.C. Cir. 1997).

A final approach, apparently adopted only by the Tenth Circuit, is to refuse to accept the theory of judicial estoppel under any circumstances. *Rascon v. U.S. West Communications*, 143 F.3d 1324 (10th Cir. 1998).

There is genuine conflict among the various Circuit Courts of Appeals concerning whether and how to apply the theory of judicial estoppel in the context of a claimant who has sought or obtained disability benefits and who also seeks relief under the ADA. This Court should grant the Petition to resolve this conflict.

III.

HOW TO CORRECTLY INTERPRET AND APPLY THE ADA WHEN A DISABLED CLAIMANT IS ALSO RECEIVING DISABILITY BENEFITS IS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

As discussed in the Petition, the question of how the courts should treat claimants who have sought and received disability benefits from the SSA and now seek to file claims under the ADA must be resolved. This issue presents an important question of federal law concerning two significant statutes. The issue is of utmost concern and gravity to the millions of Americans who apply for benefits from the SSA.

The Brief in Opposition filed by Respondent is silent on this point. Petitioner, accordingly, will not reiterate the arguments made in the Petition in this regard. Respondent's Brief in Opposition focuses solely on the merits of his particular case. This Court has the responsibility to look further and intervene when broad questions of public policy and the interpretation of important federal statutes are implicated. *See, e.g., Pinter v. Dahl*, 486 U.S. 622, 100 L. Ed. 2d 658, 108 S. Ct. 2063 (1988); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 286 L. Ed. 2d 286, 108 S. Ct. 364 (1987). This case presents such issues; this Court should grant the Petition to resolve them.

IV.

THERE IS CONTINUING CONFUSION AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF THIS COURT'S SUMMARY JUDGMENT STANDARDS.

Even if this Court concludes that the various Circuit Courts of Appeals are in fact all simply applying their own version of the summary judgment standards enunciated by this Court, the Court should still grant review of this judgment. The decision by the Sixth Circuit in this case, as well as decisions by the other Circuit Courts of Appeal, conflict with the decisions of this Court concerning the proper standards for the grant of summary judgment and demonstrate continuing confusion among the Circuits Courts of Appeals as to the proper application of this Court's summary judgment standards. This argument was set out fully in the Petition and will not be repeated here. It is significant that the Brief in Opposition did not even address this question. This Court is faced with the need to consider the global implications of *Griffith v. Wal-Mart*, 135 F.3d 376 (6th Cir. 1998). The Sixth Circuit's opinion in this case should be considered in order to reestablish the appropriate

parameters which should be used by the Circuit Courts of Appeals in granting or denying summary judgments.

In a very recent decision, the Eighth Circuit has properly applied this Court's directives on when summary judgment may appropriately be granted. *Downs v. Hawkeye Health Services, Inc.*, __ F.3d __, No. 97-3851, 1998 WL 348201 (8th Cir. July 1, 1998). In *Downs*, as in the present case, the claimant made specific statements to the SSA in his various filings with them concerning his physical inability to perform work. The Eighth Circuit refused to adopt a strict application of judicial estoppel, but noted:

> A plaintiff may not take inconsistent positions in such proceedings with impunity. An ADA plaintiff may not suddenly step forward to deny the truth of ongoing representations he has made pursuant to an application for disability benefits.

Id. at 2.

Given Mr. Downs's statements to the SSA, the *Downs* Court affirmed the summary judgment entered for his employer. Significantly, the *Downs* Court rejected the precise arguments made by Mr. Griffith here including Mr. Griffith's claim that he would have been able to continue to perform essential job duties "but for the fact that his termination itself so devastated him that his disability worsened." *Id.* at 3. The Eighth Circuit rejected this argument: "The argument is resourceful, but we are unpersuaded. First, it flatly contradicts the information he provided to the Social Security Administration." *Id.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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